82-1066

No.

# In the Supreme Court of the United States

OCTOBER TERM, 1982

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UNITED STATES OF AMERICA, APPELLANT

*v.*

HARRY PTASYNSKI, ET AL.

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*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING*

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## JURISDICTIONAL STATEMENT

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## QUESTIONS PRESENTED

1. Whether the exclusion of certain categories of Alaskan oil (26 U.S.C. 4991(b)(3)) from the coverage of the Crude Oil Windfall Profit Tax Act of 1980, violates the Uniformity Clause (Article I, Section 8, Clause 1) of the Constitution, which requires that "Duties, Imposts and Excises shall be uniform throughout the United States."

2. Assuming the answer to Question No. 1 is in the affirmative, whether the constitutionality of the remaining provisions of Title I of the Crude Oil Windfall Profit Tax Act should be upheld, pursuant to the separability clause of Section 7852(a) of the Internal Revenue Code of 1954.

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## OPINION BELOW

The memorandum opinion of the district court (App. A, *infra*, 1a-11a) is not yet officially reported.

## JURISDICTION

Several of the appellees brought these suits in the United States District Court for the District of Wyoming, seeking a refund of windfall profit taxes, a declaratory judgment that the Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223, 94 Stat. 229 et seq., is unconstitutional, and injunctive relief restraining the further assessment and collection of such taxes. On November 4, 1982, the district court entered a judgment directing that appellees recover windfall profit taxes plus interest for the taxable periods in question in unspecified amounts to be later determined by the parties (App. B, *infra*, 12a-13a). On November 12, 1982, the district court entered an amended order awarding judgment in favor of appellees in the amounts sought in the pleadings, with interest as provided by law, and also specifically setting forth the court's holding that the Crude Oil Windfall Profit Tax Act of 1980 is unconstitutional (App. C, *infra*, 14a-15a). On November 15, 1982, the district court entered a further amended judgment order limiting its rul-

ing of unconstitutionality to the provisions of Title I of the Crude Oil Windfall Profit Tax Act (26 U.S.C. (Supp. V) 4986 to 4998 and related administrative provisions) (App. D, *infra*, 16a-17a). On November 18, 1982, the United States filed a notice of appeal from all three judgment orders (App. E, *infra*, 18a). The jurisdiction of this Court rests on 28 U.S.C. 1252, which authorizes a direct appeal to this Court from an interlocutory or final judgment of a court of the United States holding an Act of Congress unconstitutional in a civil action to which the United States is a party.[1]

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 8, Clause 1 of the United States Constitution is set forth at Appendix F, *infra*, 19a. Title I of the Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223, 94 Stat. 229, and Section 7852(a) of the Internal Revenue Code of 1954 (26 U.S.C.) are set forth at Appendix G, *infra*, 20a-63a.

## STATEMENT

### A. *The Statute*

On April 2, 1980, the President signed the Crude Oil Windfall Profit Tax Act of 1980. Title I of that Act, 94 Stat. 230 *et seq.*, added Sections 4986 through 4998 to the Internal Revenue Code of 1954 (26 U.S.C. (& Supp. V)) together with related administrative provisions.[2] Under Title I of

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[1] Although the judgment order of November 4, 1982, appears to have been interlocutory insofar as it did not, by its terms, determine the amount of taxes to be refunded and it did not pass on all claims for relief, the orders of November 12 and November 15, 1982 were final judgments because they determined the specific amounts of the refunds sought in the pleadings and they contained the requisite determination that there is no just reason for delay in the entry of final judgment on the claim addressed. See Fed. R. Civ. P. 54(b). At all events, all three orders are appealable to this Court under 28 U.S.C. 1252. See *United States* v. *Clark*, 445 U.S. 23, 25-26 n.2 (1980).

[2] Title II of the Act, 94 Stat. 256 *et seq.*, provides for various energy expenditure and investment credits, unconventional fuel production

the Act, an excise tax is imposed (subject to certain exemptions) on the "windfall profit" derived from the production of domestic crude oil after February 29, 1980 (Sections 4986(a) and 4991(a)). The "windfall profit" subject to the tax is determined (on a per barrel basis) by reference to the difference between the "removal price" (generally the price at which the oil is sold at the wellhead) and an "adjusted base price" reflecting, with certain adjustments, the price at which such oil would have been sold in 1979, under varying assumptions applicable to different categories of oil (Sections 4988(a), 4988(c) and 4989)).[3] An offset, however, is allowed for state severance taxes attributable to the value of the oil in excess of its "adjusted base price" (Sections 4988(a)(2) and 4996(c)). Finally, in no event can the taxable "windfall profit" exceed 90 percent of the net income attributable to the oil (Section 4988(b)).

The rate of the tax varies between 30 percent and 70 percent of the "windfall profit" so determined. The rate depends upon the particular category of the oil (Section 4987(a)). The lowest rate (as well as the most favorable "base price" (see note 3, *supra*)) is applicable to "tier 3 oil" (which includes "newly discovered oil," "heavy oil"

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credits, energy related uses of tax-exempt bonds, and special income tax deductions for "tertiary injectant expenses." Title III of the Act, 94 Stat. 288 *et seq.* provides for energy assistance for certain low income households, and Title IV provides for a number of miscellaneous amendments to unrelated provisions of the Internal Revenue Code of 1954 and other statutes.

[3] In the case of "tier 1 oil"—*i.e.*, oil that does not qualify for the more favorable treatment accorded "tier 2" or "tier 3" oil—the base price reflects the applicable ceiling price (less 21 cents) for such oil if it had been sold as "upper tier" oil in May 1979, prior to the beginning of the phase out of the oil price controls provided for under the Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, 89 Stat. 871. Such "upper tier" prices under the then applicable regulations averaged $13.02 per barrel. H. R. Conf. Rep. No. 96-817, 96th Cong., 2d Sess. 92 (1980). The "base price" of "tier 2" and "tier 3 oil" is equal to the price at which such oil would have been sold in December 1979 on the assumptions (1) that the price of all domestic crude oil was then uncontrolled; and (2) that the average prices for domestic crude oil were then $15.20 per barrel for "tier 2 oil" or $16.55 for "tier 3 oil". Section 4989(c) and (d).

and "incremental tertiary oil" (Sections 4991(e) and 4993)).[4] The 30 percent rate also applies to "independent producer oil" (Section 4992) that also qualifies as "tier 2 oil" (which is oil from "stripper well properties" and from economic interests in National Petroleum Reserves held by the United States (Section 4991(d)). The highest rate (as well as the least favorable "base price") applies to "tier 1 oil" (which includes all nonexempt domestic oil other than "tier 2" or "tier 3 oil" (Section 4991(c)) that does not qualify as "independent producer oil." "Tier 1 oil" that qualifies as "independent producer oil" and "tier 2 oil" that does not qualify as "independent producer oil" are taxable at the intermediate rates of 50 and 60 percent, respectively.

Section 4991(b) exempts certain classes of oil from the tax. The exempt categories are: (1) oil from "qualified governmental interest[s]" (Section 4994(a)); (2) oil from "qualified charitable interest[s]" (Section 4994(b)); (3) certain oil from interests held by or for Indian tribes or their members or produced by corporations organized under the Alaska Native Claims Settlement Act, 43 U.S.C. 1601 *et seq.* (Section 4994(d)); (4) "front-end tertiary oil" (Section 4994(c)); and (5) "exempt Alaskan oil" (Section 4994(e)). The latter category includes certain oil produced "(1) from a reservoir from which oil has been produced in commercial quantities through a well located north of the Arctic Circle, or (2) from a well located on the northerly side of the divide of the Alaska-Aleutian Range and at least 75 miles from the nearest point on the Trans-Alaska Pipeline System" (Section 4994(e)). Exempt Alaskan oil does not include, however, "Sadlerochit oil," defined as "crude oil produced from the Sadlerochit reservoir in the Prudhoe Bay oilfield" (Section 4996(d)(3)).[5]

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[4] Section 602 of the Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 337, amended Section 4987(b) to reduce the applicable tax rate in the case of "newly discovered oil" from 30 percent to 15 percent, in gradual steps during the period 1982-1986.

[5] Further exemptions were provided for certain oil produced by independent producers from "stripper well propert[ies]" and specified portions of a "qualified royalty owner's qualified royalty production,"

The liability for the windfall profit tax is ultimately placed on the "producer" of the oil (Section 4986(b)), defined generally as "the holder of the economic interest with respect to the crude oil" (Section 4996(a)(1)). Section 4995, however, requires that the tax be withheld from the purchase price by the first purchaser of the oil, and further provides that the producer shall thereafter be treated as having paid the amount so withheld.[6]

### B. *The Proceedings Below*

Five of the appellees are independent domestic oil producers and/or royalty holders who alleged that they were subject to the windfall profit tax.[7] They brought this action seeking: (1) a declaratory judgment that the Alaskan oil exemption from the windfall profit tax violates the Uniformity Clause of Article I, Section 8 of the Constitution, and that the tax violates the Due Process and Taking Clauses of the Fifth Amendment to the Constitution; (2) an adjudication that all such taxes were illegally assessed and collected; and (3) an order directing the government to refund all such taxes.[8]

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under amendments made to Sections 4991(b) and 4994 by Section 601 of the Economic Recovery Tax Act of 1981, (95 Stat. 336–337).

[6] The tax is deductible, for income tax purposes, by the producer under Section 164(a)(5) of the 1954 Code, as added by Section 101(b) of the Crude Oil Windfall Profit Tax Act of 1980, 94 Stat. 230. Certain holders of royalty interests, however, are entitled to treat up to $1,000 of windfall profit taxes paid with respect to their "qualified royalty production" for 1980 as a creditable or refundable "overpayment." Section 6429 of the Internal Revenue Code of 1954, as added by Section 1131 of the Omnibus Reconciliation Act of 1980, Pub. L. No. 96-499, 94 Stat. 2599. These provisions were extended to encompass "qualified royalty production" for the year 1981, and the amount allowable as a credit for that year was increased to $2,500, by Section 601 of the Economic Recovery Tax Act of 1981.

[7] The remaining appellees are 30 trade associations whose members are alleged to be oil producers or royalty holders subject to the tax, and the States of Texas and Louisiana, which were permitted to intervene in the case. See note 8, *infra*. Two other individual producers withdrew from the suit.

[8] The original complaint did not allege that any of appellees filed administrative refund claims with respect to the taxes. However, ap-

On cross motions for summary judgment, the district court concluded that the "exempt Alaskan oil" provision of the Windfall Profit Tax Act is unconstitutional under the Uniformity Clause.[9] It reasoned that "[t]he Act, on its face, says that one state, Alaska, is not subject to the same tax, at the same rate as all the other states. This is a clear violation of the constitutional requirement of uniformity" (App. A, *infra*, 7a). In so holding, the court rejected the government's argument that a rational justification for the Alaskan oil exemption supported its validity. As the court saw the matter, "[l]egitimate exemptions from tax can exist, but the exemption must be one which is not constitutionally forbidden. The Constitution has unequivocally set forth a limitation on indirect taxation—uniformity—which has been narrowly, but precisely defined by the judiciary. Distinctions based on geography are simply not allowed" (*ibid*).[10]

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pellees filed two amended complaints alleging that the producers and royalty holders had filed refund claims covering taxes paid for one of more taxable periods in calendar year 1980. The amended complaints also sought an order restraining the further assessment or collection of windfall profit taxes.

In response to the government's motion to dismiss, urging, *inter alia*, that several trade associations lacked standing to join the action as plaintiffs, the district court dismissed the associations as plaintiffs but permitted them to remain as permissive intervenors. Moreover, over the government's objection, the district court permitted the States of Texas and Louisiana to intervene in the litigation urging that the windfall profit tax violates the Tenth Amendment as well as the Uniformity Clause (App. A, *infra*, 2a).

Finally, a subsequent suit that was filed by appellee John Partridge, after filing a new refund claim covering all taxable periods in calendar year 1980, and which sought identical relief was consolidated with the original action (App. A, *infra*, 2a).

[9] The district court first ruled that the question of the constitutionality of the windfall profit tax was ripe for decision despite the fact that there had been no production of "exempt Alaskan oil" during the periods in suit (see pages 20–21 note 28, *infra*).

[10] Although its ruling that the Windfall Profit Tax Act violated the Uniformity Clause obviated the necessity for consideration of appellees' claim that the Act was barred by the Due Process Clause of the Fifth Amendment, the court concluded that "[t]he Fifth Amendment

The court further rejected the government's alternative contention that, at all events, the remaining provisions of the Act should be held valid and effective, pursuant to the "separability clause" set forth in Section 7852(a) of the Internal Revenue Code of 1954, with respect to all domestic oil production not subject to other valid exemptions. In so ruling, the court stated that it would have given more "deferential consideration" to a separability clause written into the Windfall Profit Tax Act itself, but held that Section 7852(a) of the Internal Revenue Code of 1954 (to which the windfall profit tax provisions were added) did not provide a basis for sustaining the remaining tax provisions (App. A, *infra*, 8a). In the district court's view, it was "clear that the Alaska exemption was the result of negotiations and compromise, and that the Act as it exists today would not have been passed without the invalid Alaska provision" (App. A, *infra*, 9a). Hence, it concluded that applying the "separability clause" of Section 7852(a) in such a way as to extend the tax to Alaskan oil would require the court to engage in impermissible judicial legislation (App. A, *infra*, 7a-10a).[11]

## THE QUESTIONS ARE SUBSTANTIAL

In holding unconstitutional the windfall profit tax provisions added to the Internal Revenue Code of 1954 by the

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challenge to the windfall profits tax is unfounded, and without merit * * *" (App. A, *infra*, 10a).

[11] In its final amended judgment, the district court noted that its ruling was restricted to the provisions added by Title I of the Crude Oil Windfall Profit Tax Act of 1980 (26 U.S.C. (Supp. V) 4986-4998), and that it did not intend to hold the remaining provisions invalid as a result of its conclusion that the "exempt Alaskan oil" provisions could not be severed from the remaining provisions of the Act (App. D, *infra*, 16a).

The district court stayed the effect of its order (App. D, *infra*, 17a). Hence, no refunds have been issued to appellees and the windfall profit tax continues to be collected *pendente lite*. Accordingly, the government's arguments that appellees' suit for injunctive and declaratory relief is barred by the Anti-Injunction Act (26 U.S.C. (Supp. V) 7421(a)) and the tax exception to the Declaratory Judgment Act (28 U.S.C. 2201) are not before the Court.

Crude Oil Windfall Profit Tax Act of 1980, the district court has invalidated an important federal tax statute that Congress enacted as an integral part of the decontrol of domestic oil pricing. The amounts at stake are of enormous magnitude. It is estimated that the net windfall profit tax revenues from the inception of the tax through the end of the 1982 fiscal year are in excess of $26 billion, and that the net revenues during the next five years will be approximately $50 billion.[12] This Court should note probable jurisdiction in order to resolve the important constitutional questions presented and to resolve definitively the validity of the windfall profit tax provisions of the Internal Revenue Code.

1. *The Background of the Alaska Oil Exemption.* Congress enacted the windfall profit tax in response to President Carter's decision in April 1979, to begin phasing out the price controls that had been imposed on domestic oil since 1971. Oil price controls had been extended and made mandatory through May 31, 1979, by the Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, 89 Stat. 871. That Act gave the President discretionary authority to extend such controls from May 31, 1979, through September 30, 1981. At the time domestic crude oil prices were first frozen in 1971, the price of crude oil had risen from a prevailing price of about $2.90 per barrel during the prior decade, to $3.39 per barrel. By June 1979, the uncontrolled world price for oil (including transportation costs to the United States) had risen to nearly $20 per barrel, with "spot market" prices occasionally exceeding $30 per barrel. At the same time, the average controlled price of domestic "old oil" was $5.86 per barrel, and the average controlled price of domestic "new oil" was $13.06 per barrel. President

[12] The gross revenues from the windfall profit tax through the end of fiscal year 1982 are estimated to be $50 billion. The windfall profit tax, however, is deductible for federal income tax purposes, under Section 164(a)(5) of the 1954 Code, and the windfall profit taxes attributable to economic interests owned by the United States reduce proprietary receipts. Accordingly, the net budgetary impact of the statutory provisions in question is smaller than the gross liability, but nevertheless substantial.

Carter's announcement indicated that existing controls would be phased out over a period beginning in January 1980, and ending on October 1, 1981, the effective date of expiration of the President's authority under the Energy Policy and Conservation Act of 1975. See H. R. Rep. No. 96-304, 96th Cong., 1st Sess. 4-7 (1980).[13]

The President proposed the windfall profit tax as an integral part of his plan to phase out existing price controls "[i]n order to prevent oil producers from reaping excessive profits from decontrol * * *." H.R. Doc. No. 96-107, 96th Cong., 1st Sess. 1 (1979). The President noted that the gradual removal of price controls on domestic oil would encourage exploration and production, eliminate inequities and inefficiencies under the existing system of controls, reduce United States dependency on foreign oil, and reduce the adverse balance of payments attributable to the importation of oil. He further concluded, however, that "deregulation of domestic oil prices will also provide enormous windfall gains for domestic producers of oil" as domestic oil prices rise to the prevailing world price, which had been drastically affected and could continue to be affected by actions taken by the nations participating in the "OPEC cartel" (*id.* at 1-2).

In favorably reporting on the proposed legislation, the House Ways and Means Committee similarly noted that decontrol of domestic oil prices would lead not only to "limited increases in production," but also to increases in profits to oil producers "far in excess of what most of them originally anticipated when they drilled their wells and in excess of what they might now be expected to invest in energy production." H.R. Rep. No. 96-304, *supra*, at 7. Thus, it agreed that "the additional revenues received by oil producers and royalty owners, both as a result of decontrol of oil prices and as a result of increases in world oil prices substantially prevailing in 1978, are an appropriate object of

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[13] The phase-out of price controls on domestic crude oil was actually completed by Exec. Order No. 12287, 3 C.F.R. 124, issued by President Reagan on January 28, 1981.

taxation" (*ibid.*). See also S. Rep. No. 96-394, 96th Cong., 1st Sess. 27 (1979).[14]

As we have noted (pages 3–4, *supra*), the tax that Congress ultimately adopted is imposed at varying rates, and the "windfall profit" subject to the tax is computed on varying bases, depending on the type of oil produced,[15] the nature of the producer,[16] the circumstances and manner under which the oil is produced,[17] and the time such oil was discovered and went into production.[18] While the pattern of classifications and exemptions was modified in certain respects as the proposed legislation was considered by both houses of Congress, the primary objective remained "to impose relatively high tax rates where production cannot be expected to respond very much to further increases in price and relatively low tax rates on oil whose production is likely to be responsive to price." H.R. Rep. No. 96-304, *supra*, at 7. See also S. Rep. No. 96-394, *supra*, at 7, 9.

Because of the unique climatological difficulties in oil extraction in the "North Slope" areas of Alaska, Congress recognized from the outset that oil produced in that distinct region presented a special case with respect to both the ex-

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[14] Under Section 4990, the windfall profit tax is to be phased out over a 33-month period, beginning with the later of January 1988, or the first month (not later than January, 1991) after the Secretary of the Treasury estimates that the aggregate net revenues from the tax will exceed $227.3 billion as of the end of that month. Under Section 102(a) and (b) of the Act, 94 Stat. 255, revenues collected in the interim are required to be allocated to a separate account in the Treasury for the following uses: (1) income tax reductions (60 percent); (2) low-income assistance (25 percent); and (3) energy and transportation programs (15 percent).

[15] See, e.g., Section 4991(e)(1)(B) and (e)(3), placing "heavy oil" in the favorable category of "tier 3 oil".

[16] See, e.g., Section 4987(b)(2), providing for reduced tax rates in the case of "independent producer oil" as defined by Section 4992.

[17] See, e.g., Section 4991(d)(1)(A) and (e)(l), providing that oil from "stripper well" properties and "incremental tertiary oil," as defined in Section 4993, are to be favorably treated as "tier 2 oil" and "tier 3 oil," respectively.

[18] See Section 4991(e)(1)(A), providing that "newly discovered oil" is to be favorably treated as "tier 3 oil."

istence of "windfall profits" and the determination of the appropriate tax to be imposed. Under the original Administration proposal, all oil produced from wells north of the Arctic Circle would have been exempt from the tax. H.R. 3919, 96th Cong., 1st Sess. § 2 (1979). At that time, because of the extraordinary transportation costs involved, Alaskan oil was selling for a wellhead price that was far below what eventually became the lowest "base price" for computing the taxable "windfall profit." Moreover, it was expected that the Alaskan wellhead price would remain $8 to $9 less per barrel than the uncontrolled price of oil in the lower 48 states. H.R. Rep. No. 96-304, *supra*, at 30. See also Staff of Joint Comm. on Taxation, 96th Cong., 1st Sess., *The Design of a Windfall Profit Tax* 21 (Comm. Print 1979). Accordingly, the Secretary of the Treasury expressed the view that "there are no windfalls that will be gained by the producers of Alaskan crude." *Windfall Profits Tax and Energy Trust Fund: Hearings Before the House Comm. on Ways and Means*, 96th Cong., 1st Sess. 27 (1979) ("House Hearings"). As the Secretary explained, "[i]t is easier to exempt Alaskan production from the tax than to require Alaskan producers to file tax returns solely for the purpose of showing that no liability has been incurred." *House Hearings*, *supra*, at 19.[19]

The House Committee, and the House itself, agreed to the concept of exempting "new oil" produced from wells north of the Arctic Circle, but proposed to exclude "Sadlerochit oil"—which had already gone into production—from the scope of that exemption. The bill as reported by the Senate Finance Committee would have eliminated the ne-

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[19] As the Joint Committee staff study indicated, (*House Hearings*, *supra*, at 21), the world price of oil would have to rise (as it ultimately did) to at least $22 per barrel (or the tariff rate for the Trans-Alaska Pipeline would have to be correspondingly reduced) in order for the price of the Alaskan oil to rise to its then applicable ceiling price. The staff study also indicated, (*id.* at 22) that the exemption was intended "to eliminate the possibility of creating a disincentive for the production of Alaskan oil." Although it concluded that there was relatively little risk that a tax on Sadlerochit oil would discourage production, it noted that production costs for the other two known Prudhoe Bay reservoirs would be higher. *Id.* at 22.

cessity of providing such a specific exemption for new North Slope oil by proposing to exempt *all* "newly discovered oil" from the scope of the tax. S. Rep. No. 96-394, 96th Cong., 1st Sess. 2, 42-43 (1979).[20] A floor amendment proposed by the Majority Leader Senator Robert Byrd, and approved by the Senate, however, provided for the imposition of a 10 percent tax on the "windfall profit" from "newly discovered oil (other than newly discovered oil produced north of the Arctic Circle)." 125 Cong. Rec. S18564-S18568, S18863 (daily ed. Dec. 14 and 17, 1979).[21]

Thus, while the bills passed by the House and the Senate differed on a number of points, both ultimately provided for taxing "newly discovered oil," but on a favorable basis and subject to an exemption for new oil (*i.e.*, oil other than Sadlerochit oil) produced north of the Arctic Circle. The legislation thereafter took its final form in the version approved by the conferees assembled to reconcile the differences between the Senate and House bills. The conference version expanded the scope of the Alaskan exemption to include oil that might be produced in areas south of the Arctic Circle, but north of the divide of the Alaska-Aleutian mountain range, if produced from a well that is at least 75 miles from the nearest point on the Trans-Alaskan Pipeline

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[20] The Finance Committee proposal, like the provision ultimately enacted (Section 4991(e)(2)), provided that the term "newly discovered oil" has the same meaning that the term had in the June 1979 energy regulations. Under that definition, the term would encompass all oil from properties from which no crude oil was produced in calendar year 1978. See 10 C.F.R. 212.79(b), 44 Fed. Reg. 25828, 25832 (1979). As the committee noted, this definition of "newly discovered oil" would exclude Sadlerochit oil. S. Rep. No. 96-394, *supra*, at 42-43.

[21] Amendments previously offered by Senators Ribicoff and Bradley would have taxed the "windfall profit" from "newly discovered oil" at a rate of 20 percent, but also would have exempted "newly discovered oil" produced north of the Arctic Circle. 125 Cong. Rec. S18141 (daily ed. Dec. 10, 1979). Concerns with respect to the high costs and risks involved in producing North Slope oil and the disincentive to further exploration and development that would be imposed by subjecting that oil to tax had been expressed by both Senator Gravel (125 Cong. Rec. S16327 (daily ed. Nov. 8, 1979)), and Senator Stevens (125 Cong. Rec. S17422, S17478-S17480 (daily ed. Nov. 28 and 29, 1979)).

System. The conference report noted that this exemption "reflects the concern of the conferees that taxation of this production would discourage exploration and development of reservoirs in areas of extreme climatic conditions." H.R. Conf. Rep. No. 96-817, 96th Cong., 2d Sess. 103 (1980). The conference version was approved without further change, by the House by a vote of 302 to 107 (126 Cong. Rec. H1861 (daily ed. Mar. 13, 1980)) and by the Senate by a vote of 66 to 31 (126 Cong. Rec. S3151 (daily ed. Mar. 27, 1980)).

2. *The Uniformity Clause.* a. Prior to the decision below, no taxing statute had ever been held invalid on the ground that it violated the Uniformity Clause of Article I, Section 8 of the Constitution. In ruling that the windfall profit tax violated that clause, the district court concluded that "[d]istinctions based on geography are simply not allowed" (App. A, *infra*, 7a). Thus, it ruled that the "exempt Alaskan oil" provisions of Sections 4991(b)(3) and 4994(e) of the 1954 Code rendered the tax unconstitutional per se without regard to any rational justification that might exist for the exempt classification. The court's ruling rests upon a literal application of this Court's statement in the *Head Money Cases*, 112 U.S. 580, 594 (1884), that a "tax is uniform when it operates with the same force and effect in every place where the subject of it is found."

But the district court's conclusion that an excise tax is not uniform and therefore violates Article I, Section 8 where *any* geographical considerations are employed in the definition of the "subject" of or exemptions from the tax, is not supported by the actual holding of the *Head Money Cases*. Nor do the underlying purposes of the Uniformity Clause compel such a per se rule against taking any geographic considerations into account in taxing statutes. As Joseph Story explained in his classic constitutional text:

> The answer to the * * * [uniformity requirement] may be given in a few words. It was to cut off all undue preferences of one state over another, in the regulation of subjects affecting their common interests. Unless duties, imposts and excises were uniform, the grossest and most oppressive inequalities vitally af-

fecting the pursuits and employments of the people of different states might exist.

J. Story, *Commentaries on the Constitution of the United States*, § 957, at 673 (2d ed. 1851).

In short, the Uniformity Clause was designed to prevent "combinations" that might, through the exercise of the taxing power, strike at the "vital interests" of one region. *Ibid.* See also Warren, *The Making of the Constitution* 587-588, 726-727 (2d ed. 1937). Quite the opposite happened here, where substantial congressional majorities recognized and chose to accommodate special circumstances confined to a limited geographical area. The role of judicial review in our constitutional system ordinarily would not be thought to be at its zenith where the claim is, at bottom, that the representative institutions of the federal government should be restrained from discriminating against 49 states in favor of one.

2. It is well established that the Uniformity Clause does not require what might be termed "intrinsic" uniformity. Rather, it requires no more than a geographic uniformity. See *Fernandez* v. *Wiener*, 326 U.S. 340, 359 (1945); *Brushaber* v. *Union Pac. R. R.*, 240 U.S. 1, 24 (1916); *Flint* v. *Stone Tracy Co.*, 220 U.S. 107, 175 (1911); *Knowlton* v. *Moore*, 178 U.S. 41, 83-109 (1900). See also *Florida* v. *Mellon*, 273 U.S. 12, 17 (1927). Moreover, it is likewise settled that the framers did not intend to require that "duties, imposts or excises" fall equally on the various states or their populations.[22] *Knowlton* v. *Moore*, *supra*, 178 U.S. at

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[22] By contrast, "[d]irect taxes," such as taxes on property or capitation taxes, are required to be apportioned among the states on the basis of their respective populations. Article I, Section 9, Clause 7. The Sixteenth Amendment eliminated the apportionment requirement for taxes on income that would be classified, under *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U.S. 429, on reargument, 158 U.S. 601 (1895), as "direct taxes" imposed upon the source from which the particular type of income is derived.

Two amici curiae in the court below (the American Farm Bureau Federation and the Wyoming Farm Bureau Federation) contended that the windfall profit tax was a direct tax that had to comply with the Apportionment Clause. We submit, however, that this tax is properly classified and imposed as an "excise" because it is not imposed on

104. Thus, Congress' broad power to choose the appropriate subjects of taxation encompasses the power to choose subjects that do not exist uniformly throughout the United States. *Knowlton* v. *Moore*, *supra*, 178 U.S. at 108; *Head Money Cases*, *supra*, 112 U.S. at 595. Assuming the subject chosen by Congress for taxation (or exemption) itself represents a permissible classification, the Uniformity Clause is not violated simply because that subject occurs only in a few states, or indeed only a single state. "If the classification be proper and legal, then there is the requisite uniformity in that respect" (*Nicol* v. *Ames*, 173 U.S. 509, 521 (1899)).

To be sure, where no other distinction can properly be drawn between a "subject" as it exists in different states, the Uniformity Clause may require the same treatment in each instance. See, e.g., *Fernandez v. Wiener*, 326 U.S. 340, 361 (1945); *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 583 (1937); *South Carolina* v. *United States*, 199 U.S. 437, 450-451 (1905); *Heitsch* v. *Kavanagh*, 200 F.2d 178, 180 (6th Cir. 1952), cert. denied, 345 U.S. 939 (1953). But while classifications that operate only in certain areas might be subject to special scrutiny in light of the purposes of the Uniformity Clause, we submit that the inquiry cannot be separated from the question whether the tax classifications drawn by Congress are supported by rational considerations showing that they are not intended, and do not operate, either as an "undue preference" in favor of, or an "oppressive" discrimination against, the affected states.

b. Contrary to the conclusion of the court below, the holding of this Court in the *Head Money Cases* affirmatively supports the power of Congress to take geographical considerations into account in drawing legitimate tax classifications. At issue there was the constitutionality of a duty

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the ownership of property per se but upon the activity of mineral extraction. See *Stanton* v. *Baltic Mining Co.*, 240 U.S. 103 (1916). At all events, since it is imposed on the income that is derived from the exploitation of economic interests in oil, the Sixteenth Amendment would permit its imposition without apportionment even assuming the tax were classified as a "direct" tax under *Pollock*. To the extent that the tax is a direct tax, the Uniformity Clause would be inapplicable.

levied against transportation companies on foreign passengers entering the United States by vessel. The Court squarely rejected the contention that the duty violated the Uniformity Clause on the ground that it did not operate with strict geographical uniformity since, by its terms, it could apply only in states having sea ports (a matter necessarily determined by considerations of their geography) and not in landlocked states where foreign passengers might arrive by railroad or other inland mode of conveyance. The Court noted that "the evil to be remedied by this legislation" did not exist on the inland borders, and that "substantial uniformity within the meaning and purpose of the Constitution" was achieved by the uniform application of the statute in those quarters in which that "evil" was found to exist. *Head Money Cases*, *supra*, 112 U.S. at 595. Thus, the Court confirmed that Congress' broad power to pick and choose appropriate subjects of taxation includes the power to choose subjects that, as a matter of geographical considerations alone, exist only in certain states, and to leave untaxed similar "subjects" existing in other states. The ultimate question, in the Court's view, was whether Congress had a reasonable basis for distinguishing between the activity that was taxed in coastal states and the similar activity that was untaxed in inland states. Similarly, in construing the analogous uniformity proviso applicable to the exercise of the bankruptcy power,[23] this Court, citing the *Head Money Cases*, concluded that the uniformity requirement "does not deny Congress power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 159 (1974).

Here, as in the *Head Money Cases* and the *Regional Rail Reorganization Act Cases*, the validity of the "Alaskan oil exemption" from the windfall profit tax should not turn, as the district court concluded, simply on the fact that

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[23] Article I, Section 8, Clause 4 of the Constitution grants Congress power to establish "uniform laws on the subject of Bankruptcies throughout the United States."

Congress took geographical considerations into account, but on whether the classification based on those geographical considerations is justified in terms of the relationship of those considerations to the "subject" of the regulation or tax. Put another way, the question is whether in fashioning the tax, Congress could, on the one hand, favor generally "newly discovered oil" over "old oil" and accord the most favorable treatment to "newly discovered oil" located in certain areas (Section 4994(e)).

There can, of course, be no dispute that the exemptions here at issue are geographically defined so as to exclude oil located in all of the 50 states except portions of Alaska.[24] It is almost equally beyond dispute, however, that Congress had a rational basis for drawing such a classification. Obviously, this is not an instance in which "combinations" have drawn taxing legislation in such a way as to grant an "undue preference" in favor of their own states or to impose an "oppressive" discrimination against a minority. Rather, it is an instance of a broad-based congressional majority (including many members from other oil-producing states) granting an exemption applicable to only a portion of the oil production that might be derived in the future from certain areas that include a part of a single state.

Nor could these provisions be characterized as an "undue preference" in favor of Alaskan producers. Indeed, the benefit of the exemption falls on the owners of economic interests in that oil wherever they might reside or be incorporated. Morever, the "subject" of the tax in question is not the production of crude oil, per se, but the enjoyment of a "windfall profit" by the holders of such economic interests as a result of the removal of price controls on domestic oil and concomitant increase in the selling price of such oil to

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[24] In describing the exemption (App. A, *infra*, 4a) the district court characterized it as encompassing "certain oil found only in Alaska." In fact, it would apply to any oil, including offshore oil, that might be produced from wells located north of the Arctic Circle. Offshore oil found farther than three miles from Alaska's coastline and located on the Outer Continental Shelf is subject to the exclusive jurisdiction and control of the United States. Submerged Lands Act, 43 U.S.C. (& Supp. IV) 1301-1315; see *Maryland* v. *Louisiana*, 451 U.S. 725, 730 (1981).

the prevailing world price. The various classifications adopted with regard to this tax demonstrate that Congress' belief that the existence and extent of such "windfall profits," as well as the appropriate tax to be levied, would vary on the basis of a number of factors including the nature and type of the oil in question, the nature of the producer and the quality of his interest in the oil, and the circumstances under which the oil is produced. As the legislative history of the Act makes clear, Congress sought to draw tax classifications that would not deter producers from fully exploiting existing properties or from exploring and developing new properties. See H.R. Rep. No. 96-304, *supra*, at 7, 14; S. Rep. No. 96-394, *supra*, at 2, 6-7.[25]

The critical question therefore is whether Congress could carve out a portion of the "newly discovered oil" that might be produced in areas north of the Arctic Circle or in areas located north of the Alaska-Aleutian Range and more than 75 miles from the Trans-Alaska Pipeline System and accord such oil even more favorable treatment.[26] We submit that this exemption serves the legitimate purposes of the legislation in question, and that it does not violate the Uniformity Clause, despite the fact that it is defined in terms of the geographic location of such oil. Congress had substantial grounds for concluding that North Slope oil—particularly North Slope oil that had not yet gone into production—presented a special case, distinct from domestic oil found elsewhere (including other oil found in Alaska). First, North Slope oil that was in production at the time the tax was under consideration brought a substantially lower price at the wellhead than did equivalent oil produced in other locations of the United States because of its distance from existing markets and the necessity of transport-

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[25] Thus, "newly discovered oil" is accorded the most favorable treatment of all non-exempt categories in terms of both the "adjusted base price" and the tax rate.

[26] The definition of "newly discovered oil" would apply to all "exempt Alaskan oil" since Sadlerochit oil is excluded from the scope of that exemption and since no other oil was being produced from the areas described by Section 4994(e) prior to 1981 (see page 20, note 28, *infra*).

ing it over the newly constructed Trans-Alaska Pipeline. Indeed, the price of such North Slope oil was only about half the applicable ceiling price for such oil. H.R. Rep. No. 96-304, *supra*, at 5, 30. Moreover, Congress anticipated that the wellhead price for such oil would continue, in the foreseeable future, to be $8 to $9 less than the prevailing wellhead prices in other producing states.

Second, during the legislative debates, the point was repeatedly made, without contradiction, that because of its remote location, fragile environment, and extreme climatic conditions, the production of North Slope oil involved risks and costs that were far greater than the risks and costs of developing domestic oil properties elsewhere. See, e.g., 125 Cong. Rec. S16327 (daily ed. Nov. 8, 1979), S17422 (daily ed. Nov. 28, 1979), and S17478-S17480 (daily ed. Nov. 29, 1979) (comments of Senators Gravel and Stevens). Accordingly, Congress had substantial reason to question whether North Slope oil (other than that produced from the Sadlerochit reservoir) would, in fact, generate a "windfall profit" to the same extent as the other categories of oil subject to this tax, and to conclude that the imposition of even the relatively small windfall profit tax burden applicable in the case of other "newly discovered oil" might deter further exploration and development of North Slope properties. There was no showing either in Congress or in the court below that domestic production elsewhere would involve similar developmental costs and risks or transportation-related disparities.[27]

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[27] In addition, the Alaskan exemption was granted, in part, because of Congress' concern that a disproportionate part of the tax would otherwise fall on Alaskan oil. As Senator Stevens noted (125 Cong. Rec. S17478 (daily ed. Nov. 29, 1979)), there are no "independent producers" operating on the North Slope, nor would any of that oil (including Sadlerochit oil, which represented the largest of the known reservoirs) fall within any of the other favorably taxed categories that are found elsewhere. Thus, Senator Long indicated that the Alaskan exemption was adopted in order to make the tax apply with a greater degree of intrinsic uniformity. 126 Cong. Rec. S3056 (daily ed. Mar. 26, 1980). Though is is settled that intrinsic uniformity is not required under the Uniformity Clause, the framers of the Constitution could hardly have intended that the Uniformity Clause would impede Congress' attempts to distribute the burden of a tax more equitably among the states.

In sum, Congress should be free to draw an exemption provision based, in general terms, on the distance of newly-discovered domestic oil from existing transportation systems and markets, and on unusual development costs incurred as a result of extreme climatic and environmental conditions, even though those conditions might be found to exist only in limited areas and, perhaps, only within a single state. For example, if Congress had cast the exemption for North Slope oil in terms of a location in which the average temperature did not exceed a particular level, there could be no quarrel with such a provision under the Uniformity Clause. An exemption provision that is designed to achieve precisely the same result and that is justified by precisely the same considerations, should not be rendered unconstitutional on the ground that Congress chose to define the scope of the exemption not in terms of the underlying conditions themselves, but rather in terms of the only geographic location in which Congress had reason to believe that those conditions existed, viz., the North Slope of Alaska. The purpose of the Uniformity Clause, after all, is to provide substantive protection to the states, rather than to require mere niceties of congressional draftsmanship. Cf. *Head Money Cases*, *supra*, 112 U.S. at 594; *Regional Rail Reorganization Act Cases*, *supra*.[28]

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[28] Even on the assumption that the Uniformity Clause prohibits Congress from drawing a distinction between North Slope "newly discovered oil" and other domestic "newly discovered oil," there was still no violation of the Uniformity Clause during the periods properly in question here. It was uncontested that there was, in fact, no production of "exempt Alaskan oil" during the periods covered by any of the refund claims in issue. Characterizing the government's contention on this point as one directed to the "ripeness" of the uniformity question for decision, the district court concluded that the fact that production ultimately did occur (starting in December, 1981) rendered it appropriate to resolve that question (App. A, *infra*, 4a-5a).

But the question is not simply one of ripeness, as such, but whether, assuming the district court's reading of the Uniformity Clause is correct, the Act could be deemed to violate the Clause when, in fact, during the only periods for which the legality of the tax can be questioned in this refund suit, the taxing provisions operated with precisely the "same force and effect in every place where the subject * * * [was] found." Put another way, all oil falling into each taxable category es-

3. *The Separability Clause.* Even on the assumption that the "Alaskan oil exemption" provisions of Sections 4991(b)(3) and 4994(e) violate the Uniformity Clause, the district court erred in holding that the entire tax was thereby rendered invalid.

Section 7852(a) of the Internal Revenue Code of 1954 (App. G, *infra*, 63a), provides that "[i]f any provision of this title [26 U.S.C.], or the application thereof to any person or circumstances, is held invalid, the remainder of the title, and the application of such provision to other persons or circumstances, shall not be affected thereby." Such a provision has been included in the tax laws in terms virtually identical to those of Section 7852(a) since the Revenue Act of 1921, ch. 136, Section 1403, 42 Stat. 227. By means of this clause, Congress intended to preserve as much of the internal revenue laws as possible in the event any particular provision was held to be invalid. Assuming the "exempt Alaskan oil" provisons are barred by the Uniformity Clause, the court should have applied the "separability clause" of the tax statute to strike the invalid provisions, but to preserve the tax with respect to the windfall profits derived from all oil production (including that from within the area described in Section 4994(e)) that is not subject to other, valid exemption provisions. At a minimum, the clause should have applied so as to preserve all of the taxing provisions that are unaffected by the "exempt Alaskan oil" provisions.

The district court, however, declined to apply the "separability clause." It first ascribed significance to the fact that this clause was set forth only in the Internal Revenue Code and not in the Windfall Profit Tax Act itself. It went on to express the belief that Congress would not have enacted the windfall profit tax without the Alaskan oil exemp-

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tablished by the Act (including "newly discovered oil") was subject to tax during these periods on the same basis wherever it was found. Since the assertedly defective provisions remained wholly inoperative during the period for which the taxes in question were collected, there was not simply "substantial uniformity," but strict geographical uniformity with respect to the imposition of those taxes during those periods.

tion, and that it would be engaging in impermissible judicial legislation to apply the "separability clause" in such a way as to deny the benefit of an invalid exemption that Congress had included in the statute.

But contrary to the district court's initial rationale, there was simply no need for Congress to add an independent "separability clause" to the Windfall Profit Tax Act because those provisions were directly added to the Internal Revenue Code. The separability clause that is part of the Code is applicable to amendments to the 1954 Code as well as to provisions that were included in the original 1954 recodification of the internal revenue laws. See *Sipes* v. *United States*, 321 F.2d 174, 178 (8th Cir.), cert. denied, 375 U.S. 913 (1963) (amended provision of the 1954 Code); *United States* v. *Castro*, 413 F.2d 891, 894 (1st Cir. 1969) (original provision of the 1954 Code). Thus, once the windfall profit tax provisions of Sections 4986 through 4998 were added to the Code, each of those provisions became fully subject to the "separability clause" of Section 7852(a) to the same extent any other provision of the Code would be.

To be sure, the existence of a separability clause is not conclusive as to whether a statute will be held invalid as a whole or invalid only as to those specific provisions that directly offend a limitation imposed by the Constitution. Rather, the courts must examine the legislative intention underlying the statute in question to determine whether and to what extent the statute was intended to operate in the absence of the invalid provisions. See, e.g., *Dorchy* v. *Kansas*, 264 U.S. 286, 290 (1924). Nevertheless, the existence of such a separability clause creates, at the minimum, a strong presumption that Congress intended to save as much of a statute as possible. As this Court observed in *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 312-313 (1936):

> Under the statutory rule, the presumption [of validity of the remaining portions of the statute] must be overcome by considerations which establish "the clear probability that the invalid part being eliminated the legislature would not have been satisfied with what remains," *Williams* v. *Standard Oil Co.*, 278 U.S. 235, 241 *et seq.*; or as stated in *Utah Power & L. Co.* v. *Pfost*, 286 U.S. 165, 184-185, "the clear probability

> that the legislature would not have been satisfied with the statute unless it had included the invalid part."

See also *Champlin Refining Co.* v. *Corporation Commission of Oklahoma*, 286 U.S. 210, 234 (1932).[29]

Despite the district court's assertion that the "legislative history and spirit remains somewhat of an enigma in this case" (App. A, *infra*, 9a), the legislative history indicates that Congress was specifically aware of the possibility that the Alaskan oil exemption might be challenged under the Uniformity Clause and understood that the "separability clause" set forth in Section 7852(a) of the Code would apply if that exemption were held invalid. Reservations as to the constitutionality of the tax were expressed by a number of Senators. 126 Cong. Rec. S2771, S2773-S2774 (daily ed. Mar. 20, 1980); S2825-S2828 (daily ed. Mar. 21, 1980), and S2854-S2855 (daily ed. Mar. 24, 1980) (comments and submissions of Senators Boren, Stevens, and Schmitt). In response, Senator Long, then Chairman of the Finance Committee and the floor manager of the bill in the Senate, expressed the view that the bill satisfied the requirements of the Uniformity Clause. 126 Cong. Rec. S3055-S3057 (daily ed. Mar. 26, 1980). Senator Long further noted, however, that the windfall profit tax amendments would be subject, in any event, to the "separability clause" set forth in the Internal Revenue Code itself, and stated that "it is our intention that in the event the courts should find this favorable treatment for Alaska * * * should violate the [uni]formity provision in the Constitution, that provision should be regarded as a nullity and that Alaska will pay the same 30-percent tax on new oil as everybody else." *Id.* at

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[29] Indeed, a presumption in favor of separability would be appropriate in the case of general revenue measures even without such a clause. As this Court noted in *Field* v. *Clark*, 143 U.S. 649, 696-697 (1892):

> Unless it be impossible to avoid it, a general revenue statute should never be declared inoperative in all its parts because a particular part relating to a distinct subject may be invalid. A different rule might be disastrous in the financial operations of the government, and produce the utmost confusion in the business of the entire country.

S3056.[30] No contrary views were expressed as to the applicability or the intended operation of Section 7852(a) by any proponent or opponent of this legislation in either the House or the Senate. Thus, there is solid evidence that Congress intended the separability clause of Section 7852(a) to apply.

Moreover, even apart from this explicit statement as to the applicability of the general "separability clause" provided by the Code itself, there is no basis for the district court's speculation that Congress would not have imposed the windfall profit tax in the absence of an Alaskan oil exemption. As the legislative history of these provisions makes clear, the adoption of the tax was the quid pro quo for the decontrol of domestic oil prices. There is no doubt, of course, that Congress was concerned that the general imposition of a windfall profit tax with respect to all "newly discovered oil" could have a deterrent effect on the future discovery and development of new North Slope oil. There is no indication in the legislative history, however, that this was such a critical consideration that Congress would have entirely foregone the adoption of this tax, and the $227.3 billion in revenues it was estimated to produce over a 12 to 15-year period, if it could not have provided an exemption for North Slope Alaska Oil.[31]

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[30] Senator Long also expressed the view that, in the event the Alaskan exemption were held unconstitutional and the "separability clause" employed in this manner, Congress might then attempt to devise other relief, framed in non-geographical terms, for high-risk, high-transportation cost production. *Id.* at S3055.

[31] Indeed, while the district court took pains to make clear its view that its holding would not affect any of the remaining provisions of the Act not directly related to the imposition of the windfall profit tax, what is far more questionable is whether Congress would have intended to confer the benefits of the energy conservation and production measures provided by Title II of the Act, the low-income energy assistance provided for by Title III or, indeed, possibly any of the relief measures provided by Title IV of the Act, if the revenues to be generated by Title I would not be forthcoming.

Nor, we submit, could a court be considered to be engaging in impermissible judicial legislation in holding the exemption, but not the tax itself, invalid. Indeed, such a result calls for no judicial "re-writing" of the statute, but precisely accords with the specific statutory directive provided by Section 7852(a) to give effect to all provisions that are not themselves invalid. In applying such separability clauses, the question is always one of carrying out the intentions of the Congress. There may, to be sure, be instances in which it would be inappropriate, and inconsistent with the apparent legislative intent, to deny an exemption or other preferential treatment to a group intended to be benefited thereby. But there is no strict rule againt applying a separability clause in such a way as to impose a tax on a class granted the benefit of an invalid exemption. Thus, in *Utah Power & L. Co.* v. *Pfost*, 286 U.S. 165 (1932), a state tax statute that contained a "separability clause" was challenged on the ground that an exemption provision was unconstitutional. The Court squarely rejected the contention that any defect in the exemption provisions would render the entire taxing statute invalid. In this respect, the Court stated (286 U.S. at 185):

> The primary object of the statute, under review, plainly, is to raise revenue. The exemption * * * and the provisions for carrying that exemption into effect are secondary. We find no warrant for concluding that the legislature would have been content to sacrifice an important revenue statute in the event that relief from its burdens in respect of particular individuals should become ineffective. On the contrary, it seems entirely reasonable to suppose that if the legislature had expressed itself specifically in respect of the matter, it would have declared that the tax, being the vital aim of the act, was to be preserved even though the specified exemptions should fall for lack of validity. *Field* v. *Clark*, 143 U.S. 649, 696-697; *People ex rel, Alpha P.C. Co.* v. *Knapp*, 230 N.Y. 48, 60-63; 129 N.E. 202.

The same conclusion as to the "vital aim" of the windfall profit tax, if anything, finds even stronger support in the legislative history. Therefore, even if it is assumed that the

Alaskan oil exemption is barred by the Uniformity Clause, the "separability clause" of Section 7852(a) should save the remaining provisions of the Act.[32]

[32] Even if the district court was justified in refusing to apply the separability clause of Section 7852(a) to impose the tax against holders of economic interests in North Slope oil encompassed by Section 4994(e), it should have applied the "separability clause" to preserve both that exemption and, at the same time, so much of the tax as would be uniformly applied throughout the United States with or without that exemption. This could have been accomplished by upholding the provisions imposing the tax on "old oil" and exempting all "new oil" including North Slope Alaska oil. There is no doubt that Congress would have imposed a tax upon all oil with respect to which the "windfall profit" element was most apparent even if the opponents of taxing new oil had ultimately prevailed. See *Welsh* v. *United States*, 398 U.S. 333, 361-367 (1970) (Harlan, J., concurring): "Where a statute is defective because of underinclusion there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion. Cf. *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942); *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239 (1931)." There is no requirement, however, that the benefit be extended to include those who are not directly aggrieved by the improper classification.

## CONCLUSION

Probable jurisdiction should be noted.
Respectfully submitted.

LAWRENCE G. WALLACE
*Acting Solicitor General* *
JOHN F. MURRAY
*Acting Assistant Attorney General*
STUART A. SMITH
*Assistant to the Solicitor General*
GARY R. ALLEN
WILLIAM S. ESTABROOK
*Attorneys*

DECEMBER 1982

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* The Solicitor General is disqualified in this case.

## APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

No. C80-302

Filed: Nov. 4, 1982

HARRY PTASYNSKI, JOHN PARTRIDGE, BERTON W. AVERY, GOLDIE AVERY, FREDERICK S. JOHNSON, AND CALVIN PETROLEUM CORPORATION, PLAINTIFFS,

*v.*

UNITED STATES OF AMERICA, DEFENDANT.

INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, AMERICAN ASSOCIATION OF PETROLEUM LANDMEN, ASSOCIATION OF OILWELL SERVICING CONTRACTORS, EASTERN KANSAS OIL AND GAS ASSOCIATION, LIAISON COMMITTEE OF COOPERATING OIL AND GAS ASSOCIATIONS, ARKOMA BASIN INDEPENDENT GAS PRODUCERS ASSOCIATION, CALIFORNIA INDEPENDENT PRODUCERS ASSOCIATION, ILLINOIS OIL AND GAS ASSOCIATION, INDIANA OIL AND GAS ASSOCIATION, INDEPENDENT OIL AND GAS ASSOCIATION OF WEST VIRGINIA, INDEPENDENT PETROLEUM ASSOCIATION OF MOUNTAIN STATES, KANSAS INDEPENDENT OIL AND GAS ASSOCIATION, LOUISIANA LANDOWNERS ASSOCIATION, INC., MICHIGAN OIL AND GAS ASSOCIATION, NEW YORK STATE OIL PRODUCERS ASSOCIATION, INDEPENDENT OIL PRODUCERS TRI-STATE, INC., INDEPENDENT PETROLEUM ASSOCIATION OF NEW MEXICO, KENTUCKY OIL AND GAS ASSOCIATION, LOUISIANA ASSOCIATION OF INDEPENDENT PRODUCERS AND ROYALTY OWNERS, NATIONAL STRIPPER WELL ASSOCIATION, NORTH TEXAS OIL AND GAS ASSOCIATION, OHIO OIL AND GAS ASSOCIATION, PANHANDLE PRODUCERS AND ROYALTY OWNERS ASSOCIATION, PENNSYLVANIA OIL AND GAS ASSOCIATION, TENNESSEE OIL AND GAS ASSOCIATION, VIRGINIA OIL AND GAS ASSOCIATION, OKLAHOMA INDEPENDENT PETROLEUM ASSOCIATION, PENNSYLVANIA GRADE CRUDE OIL ASSOCIATION, PERMIAN BASIN PETROLEUM ASSOCIATION, TEXAS INDEPENDENT PRODUCERS AND ROYALTY OWNERS ASSOCIATION, WEST CENTRAL TEXAS OIL AND GAS ASSOCIATION, STATE OF TEXAS, AND STATE OF LOUISIANA, INTERVENORS.

No. C82-050

JOHN PARTRIDGE, PLAINTIFF,

*v.*

UNITED STATES OF AMERICA, DEFENDANT.

**MEMORANDUM OPINION**

KERR, District Judge
November 4, 1982

The question for consideration in this case is the constitutionality of the Windfall Profits Tax on Domestic Crude Oil. The tax is imposed pursuant to the Crude Oil Windfall Profits Tax Act of 1980, 26 U.S.C. § 4986 (Act), one provision of which, namely the Alaska oil exemption, 26 U.S.C. § 4994(e) provides the focus of this challenge. This Court has jurisdiction in accordance with 28 U.S.C. § 1346(a)(1) and 28 U.S.C. § 1331(a).

The plaintiffs are taxpayers, made up of independent domestic oil producers and/or royalty owners. The original filing also included the Independent Petroleum Association of America and more than thirty other associations of oil producers and royalty owners as plaintiffs. Though the association plaintiffs were dismissed pursuant to defendant's motion, they were allowed to remain in the action as permissive intervenors. Motions to intervene filed by the states of Texas and Louisiana were also granted. The American Farm Bureau Association and the Wyoming Farm Bureau Association were permitted to file an amicus curiae brief.

The original complaint has been supplemented and amended several times. Presently pending before the Court is the Second Amended and Supplemental Complaint, filed June 29, 1981, to which the defendant has responded.

A subsequent suit filed by plaintiff Partridge (C82-050) for a refund of windfall profit taxes paid in 1980 has been consolidated with the original action.

Plaintiffs, intervenors and defendant have all filed motions for summary judgment. The issue involved is one of law and there are no facts in dispute—the action is appropriate for disposition by summary judgment.

## THE WINDFALL PROFIT TAX

The Act imposes an excise tax on the oil producer for the removal of domestic crude oil. The profit subject to tax is the difference between the removal price and the statutory adjusted base price (with severance and inflation adjustments). The rate of tax is determined based upon the "tier" into which the type of oil and the type of producer is categorized. A more complete picture of the categorization is presented below.

| *Category* See § 4991 | *Base Price* See § 4989 | *Rate of Tax* See § 4987 |
|---|---|---|
| *Exempt:* | Not Applicable | No Tax |
| 1. Oil owned by Governments or charities | | |
| 2. Indian oil | | |
| 3. Certain Alaska oil | | |
| 4. "Front-end" oil, meaning oil the proceeds of which are used, subject to complex restrictions, to finance tertiary recovery projects. | | |
| *Tier 3:* | | |
| 1. Newly discovered oil | $16.55, with various adjustments | 30% |
| 2. Heavy oil | | |
| 3. Incremental tertiary oil | | |
| *Tier 2:* | | |
| 1. Stripper oil | $15.20, with various | Independents-30% Others-60% |
| 2. National Petroleum Reserve Oil | | |
| *Tier 1:* | | |
| All other oil | Approximately the May 1979 ceiling price for "upper tier" oil under the price control system, or about $13 | Independents-50% Others-70% |

Of particular import to the question of constitutionality is the exemption of certain Alaska oil. Any crude oil (other than that produced from the Sadlerochit Reservoir) which is produced from a well north of the Arctic Circle, or from a well north of the Alaska-Aleutian Range divide which is 75 miles or more from the Trans-Alaska Pipeline System is ex-

empt from the tax. This exemption involves certain oil found only in Alaska and thus is termed "exempt Alaskan oil."

## THE ISSUES

A logical presentation of the issues in this case requires that consideration first be given to the jurisdictional issue of ripeness. Defendant's allegation is that the entire issue is not ripe, at least as to these plaintiffs, because there was no oil produced to which the Alaska oil exemption could be applied during the period of time for which the refund is requested. Therefore, defendant reasons, the tax was uniformly applied during the time period involved in the suit.

Upon a finding by this Court that the issue is ripe for judicial determination, plaintiffs challenge the constitutionality of the Act on two separate theories. One theory is that the existence of the Alaska exemption makes the Act violative of the uniformity clause of the United States Constitution—art. 1, §8, cl. 1. If the Alaska oil exemption violates uniformity, plaintiffs argue, the remedy is not simply to sever the Alaska exemption, but to invalidate the entire Act.

Plaintiffs' second constitutional challenge involves two related theories based on the fifth amendment to the United States Constitution. Plaintiffs allege that the Act as a whole is unconstitutional because one, it involves confiscation or "taking" of property requiring just compensation, and two, the tax is not rationally related to the goals which the Act seeks to achieve.

## RIPENESS

The refund period involved in this suit is 1980. No oil was produced in 1980 which was subject to the Alaska exemption. On the basis of these facts, defendant alleges that the tax was uniformly applied in 1980 and thus no claim for relief exists.

The absence of production in the exempt portion of Alaska during 1980 is not relevant to this Court's determination regarding the constitutionality of the Act. There is no allegation by plaintiffs that the Act is unconstitutional

simply in its application, i.e. only when production in the Alaska exemption area begins and uniformity is actually in question. The contention is that the Act is unconstitutional on its face and thus, actual production in Alaska aside, plaintiffs have been and are being subjected to an invalid tax.

A matter is not ripe for adjudication when the question involved "emphasizes a *prospective* examination of the controversy which indicates that future events may affect its structure in ways that determine its *present* justiciability . . ." TRIBE, AMERICAN CONSTITUTIONAL LAW, § 3-13 at 61 (1978). The only future event involved in this controversy is the actual exemption of Alaska oil. The lack of uniformity, in the Act itself, exists now, and has existed since the Act was passed. This alone is sufficient for a finding that the controversy before the Court is now appropriate for adjudication. However, further support for this decision can be found from the Supreme Court of the United States. Even if the question of uniformity were not actually at issue until the Alaska exemption had been effectuated, plaintiffs were subjected to a tax which was sure to become invalid. Their interest was substantial and the threatened unconstitutionality was certain to occur. "If the injury is certainly impending, that is enough." *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *see also Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). It shall be noted here, that since 1980 the Alaska exemptions have been applied, and no purpose would be served by forcing the plaintiffs to refile a challenge to this Act.

The issue is disposed of by this Court's finding that the challenge to the constitutionality of the Act is ripe for adjudication, and shall be decided on its merits.

## UNIFORMITY

Article 1, § 8, cl. 1 of the United States Constitution provides:

> The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Wel-

> fare of the United States; but all Duties, Imposts and Excises *shall be uniform throughout the United States*. (Emphasis added)

The power of Congress to tax is very extensive. It has been termed "necessarily unlimited" *Austin v. The Aldermen*, 7 Wall. 694 (1868), "unfettered" *Pacific Insurance Co. v. Soule*, 7 Wall. 433 (1868), and without judicial remedy if it is merely "unwise or injurious." *Champion v. Ames*, 188 U.S. 321 (1903). Of course, constitutional guidelines must be followed, but within the framework of that limitation Congress "is supreme in its action." *Pacific Insurance Co. v. Soule, supra* at 443; *McCray v. United States*, 195 U.S. 27, 57 (1904). The Constitution itself places only one qualification on indirect taxes—the requirement that they be uniform. *License Tax Cases*, 5 Wall. 462, 471 (1866); *McCray v. United States, supra* at 56; THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION, S. DOC. NO. 92-82, 92d Cong., 2d Sess. 129 (1973).

This uniformity requirement applies to all excise or indirect taxes, and has been held to be one of geographic uniformity only. *Knowlton v. Moore*, 178 U.S. 41 (1900). "The classic definition of geographic uniformity is that given in the *Head Money Cases*, 112 U.S. 580, 594 (1884) . . . 'The tax is uniform when it operates with the same force and effect in every place where the subject of it is found.'" TRIBE, *supra* at § 5-11, p. 252, n. 3.

To clarify even further, uniformity seeks to prevent discrimination among the states. That is not to say that some states will not experience a greater burden of excise tax than others. By nature, the subjects of excise tax are not evenly distributed in every state. Some states have large amounts of the subject being taxed, some have smaller amounts, and some states have none at all. An indirect tax on articles or actions so diverse in their existence is valid, *so long as* in each state where the subject of the tax *is* found, the tax is applied, and applied with equal force. *Knowlton v. Moore, supra*.

In this case, the production and removal of domestic crude oil is the subject of the tax. Crude oil is not found in

each of the fifty United States, and even in those states where it is found, it varies in quantity and availability. Production and removal do not take place in the same manner or at the same rate in every state where crude oil is known to be. Some states and their citizens will pay large amounts of windfall profits tax. Some states will pay no tax at all. However, these distinctions do not make the tax on production and removal of crude oil invalid for lack of uniformity. The Constitution only requires that in each state where crude oil is found, the production and removal of that crude oil be subject to the tax and taxed at the same rate. The windfall profits tax ignores this requirement. The Act, on its face, says that one state, Alaska, is not subject to the same tax, at the same rate as all the other states. This is a clear violation of the constitutional requirement of uniformity.

Defendant's argument that a rational justification for the exemption can validate its existence is not without some merit. Legitimate exemptions from tax can exist, but the exemption must be one which is not constitutionally forbidden. The Constitution has unequivocally set forth a limitation on indirect taxation—uniformity—which has been narrowly, but precisely defined by the judiciary. Distinctions based on geography are simply not allowed.

## SEPARABILITY

The finding that the "exempt Alaskan oil" provision of the Act is unconstitutional for lack of uniformity does not necessarily dispose of the issue of the constitutionality of the Act itself. It must further be ascertained whether the invalid provision can be stricken from the Act, leaving the valid portion to be enforced separately, or whether the entire Act must fall due to the unconstitutionality of the Alaska exemption.

While several factors must be considered to reach the proper decision in each case, the test is said to be one of legislative intent. *Carter v. Carter Coal, supra;* 2 SUTHERLAND, STATUTORY CONSTRUCTION, § 44.03, p. 338 (4th ed. 1972). Unfortunately, even with an opportunity to carefully consider legislative history, it is not always a simple task to

determine with much accuracy the lawmakers' intent. Both plaintiffs and defendant have cited examples of individual statements and commentary. The most articulate of individual observations, while providing a certain amount of insight, is not necessarily indicative of the entire Congressional spirit. *American Smelting & R. Co. v. Occupational S. & H.R. Comm.*, 501 F.2d 504, 509 (8th Cir. 1974). At times, separability clauses have been used by lawmakers to signify intent or by courts as an aid in interpretation. However, it seems clear that the presence or absence of such a provision is in no way conclusive or binding on the ultimate decision of severing or requiring the entire Act to fall. *Dorchy v. Kansas*, 264 U.S. 286 (1924); *Williams v. Standard Oil Co. of Louisiana*, 278 U.S. 235 (1929); SUTHERLAND, *supra* at § 44.08, p. 349. The Internal Revenue Code, of which the windfall profits tax is a part, contains a general separability clause. 26 U.S.C. § 7852(a) provides:

> If any provision of this title, or the application thereof to any person or circumstances, is held invalid, the remainder of the title, and the application of such provision to other persons or circumstances, shall not be affected thereby.

As explicit as this provision appears, the interpretations set forth by both sides are valid. As defendant argues, it may be read to permit the invalidation of the exemption while leaving the remainder of the Act enforceable. Or as plaintiffs argue, the entire Act could be found invalid, and this provision would allow it to be stricken from the Internal Revenue Code without affecting the remainder of the title. Consequently, this Court merely notes that a separability clause does exist in the Internal Revenue Code, but that its aid in clarification of this matter is minimal and a holding can be reached without reliance on or disaffirmance of the clause. More deferential consideration would be given were a specific separability clause written into the Act itself.

With or without consideration of the separability clause, we still face the task of interpreting legislative intent. A further clue to the purpose intended by lawmakers is provided by judicial analysis. "Since no precise . . . standard

may be set out ... a rule of reasonableness is invoked." SUTHERLAND, *supra* at § 44.03, p. 338 and cases cited therein; the test is whether or not the legislation would have passed with the invalid features removed. *Carter v. Carter Coal Co., supra;* legislation is invalid in its entirety on a clear showing that "the invalid part being eliminated the legislature would not have been satisfied with what remains." *Williams v. Standard Oil Co., supra* at 242. Conceding that the legislative history and spirit remains somewhat of an enigma in this case, it is however clear that the Alaska exemption was the result of negotiations and compromise, and that the Act as it exists today would not have been passed without the invalid Alaska provision. H.R. Rep. No. 304, 96th Cong., 2d Sess. 30, *reprinted in* 1980 U.S. Code Cong. & Ad. News 587, 612-13; S. Rep. No. 394, 96th Cong., 2d Sess. 35-37, *reprinted in* 1980 U.S. Code Cong. & Ad. News 410, 444-446; 125 Cong. Rec. S 18564 (daily ed.; Amendment No. 877 as modified), adopted at S 18567 (December 14, 1979); 125 Cong. Rec. S 18564, 18566, (daily ed. December 14, 1979); 125 Cong. Rec. S 18565 (daily ed. December 14, 1979).

"Some courts uphold the valid portion of a statute when the invalid portion can be shown not to have been the inducement for passage of the act. Conversely, where the invalid portion was the principal inducement for the passage of the statute, the whole statute must fail. (footnotes omitted)" SUTHERLAND, *supra* at § 44.06, p. 346. The circumstances surrounding the windfall profits tax legislation give a strong indication that the entire Act must be declared void as a result of the unconstitutional Alaska exemption. Although "principal inducement" may be attributing more weight to the Alaska exemption than it deserves, the exemption does carry sufficient import to justify a finding that its invalidation renders the entire Act void.

This Court finds yet a further basis upon which the entire Act must be struck down. Were the Alaskan exemption simply invalidated, and the balance of the Act left independently enforceable, the result would be extension of the tax to all crude oil produced in Alaska, subject of course to the categorization of the various tiers. Action of that nature

amounts to judicial legislation which is not permissible and should be avoided by courts. Under the "guise of interpretation" courts cannot alter legislative intent or usurp legislative authority, 73 Am. Jur. 2d, *Statutes*, § 197, p. 394 (1974) and cases cited therein; SUTHERLAND, *supra* at § 44.13, p. 359, and this Court will not infringe on the powers and duties of Congress. Accordingly, due to the unconstitutionality of the Alaska exemption, the Act in its entirety must fall.

## THE FIFTH AMENDMENT

Having decided that the Windfall Profits Tax Act is unconstitutional because it violates uniformity, the Court need not rule on plaintiffs' second constitutional challenge, that based on the fifth amendment. However, the Court will note that such a challenge is without merit. The latitude of congressional power to tax has been previously noted, and within that power is the authority to select subjects of taxation. *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911); *McCray v. United States*, 195 U.S. 27 (1904). That a tax is too high, unwise, oppressive, burdensome, restrictive or even destructive does not provide a basis upon which the courts can void a tax invoked by Congress. *McCray v. United States*, *supra*; *Sonzinsky v. United States*, 300 U.S. 506 (1973). A tax by its very nature is destructive and burdensome.

As forceful and protective as the fifth amendment is, it does not act as a limitation on congressional power to tax granted by the United States Constitution. Even a seemingly arbitrary tax does not amount to confiscation or taking violative of due process. *Brushaber v. Union Pacific Railroad*, 240 U.S. 1 (1916); *McCray v. United States*, *supra*. The goal of raising revenue is a sufficient one to justify tax. *McCray v. United States*, *supra*. Surely no one is attempting to argue that the windfall profits tax is not a revenue raising measure. The fifth amendment challenge to the windfall profits tax is unfounded, and without merit, but unnecessary for a determination in this case.

## CONCLUSION

For the above-stated reasons, this Court finds that the Crude Oil Windfall Profits Tax Act of 1980, 26 U.S.C. § 4986 et. seq. violates art. 1, § 8, cl. 1 of the United States Constitution. The invalid portion of the Act cannot be severed, and thus the entire Act must fall.

Summary judgment will be entered in accordance with this Memorandum Opinion.

## APPENDIX B

## IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

No. C80-302

No. C82-050

Filed Nov. 4, 1982

### JUDGMENT

The above-entitled matter coming on regularly for hearing before the Court, taxpayer plaintiffs, intervenors and two amicus curiae appearing by and through their attorneys, Robert F. Nagel, Stephen Williams, William H. Brown, Mike Sullivan, Harold Scoggins, Mark White, Stuart Fryer, George J. Domas, Gale Norton, Richard L. Krause and Brent Kunz, and defendant appearing by and through its attorneys, Robert Livingston and Robert L. Baker, and the Court having heard the evidence and having taken said matter under advisement, and having carefully considered the pleadings, testimony and exhibits relevant and material to the matters in dispute, and the memoranda submitted by counsel in support of their respective theories of the case, and having prepared and filed herein its Memorandum Opinion, finding generally in favor of the plaintiffs and against the defendant, and being fully advised in the premises;

NOW, THEREFORE, IT IS ORDERED that plaintiffs recover of and from defendant the amount of windfall profit taxes paid by plaintiffs in March of 1980 for C80-302, and from March through December 1980 in C82-050, in such sum as may be determined by plaintiffs and defendant with interest as provided by law; it is

FURTHER ORDERED that all proceedings in this matter be stayed until a higher court has had occasion to pass upon the correctness of the trial court's decision.

Dated this 4th day of November, 1982.

EWING T. KERR
*United States District Judge*

## APPENDIX C

## IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

No. C80-302

No. C82-050

Filed Nov. 12, 1982

### AMENDED JUDGMENT

Upon the Court's own motion, the Judgment entered in this case on November 4, 1982 be, and the same is, hereby amended to read as follows:

The above-entitled matter coming on regularly for hearing before the Court, taxpayer plaintiffs, intervenors and two amicus curiae appearing by and through their attorneys, Robert F. Nagel, Stephen Williams, William H. Brown, Mike Sullivan, Harold Scoggins, Mark White, Stuart Fryer, George J. Domas, Gale Norton, Richard L. Krause and Brent Kunz, and defendant appearing by and through its attorneys, Robert Livingston and Robert L. Baker, and the Court having heard the evidence and having taken said matter under advisement, and having carefully considered the pleadings, testimony and exhibits relevant and material to the matters in dispute, and the memoranda submitted by counsel in support of their respective theories of the case, and having prepared and filed herein its Memorandum Opinion, finding generally in favor of the plaintiffs and intervenors and against the defendant, and being fully advised in the premises;

NOW, THEREFORE, IT IS ORDERED that the Windfall Profit Tax on Domestic Crude Oil, 26 U.S.C. 4986 et. seq., be, and the same is, hereby held unconstitutional; it is

*Further Ordered* that plaintiffs recover of and from defendant the amount of windfall profit taxes paid by plaintiffs in March of 1980 for C80-302, and from March through December 1980 in C82-050, in such sum as alleged in the Second Supplemental and Amended Complaint with interest as provided by law; it is

FURTHER ORDERED that all proceedings in this matter be stayed until a higher court has had occasion to pass upon the correctness of the trial court's decision; it is

FURTHER ORDERED that it is expressly determined that there is no just reason for delay in entry or final judgment and therefore judgment is entered accordingly.

Dated this 12th day of November, 1982.

EWING T. KERR
*United States District Judge*

## APPENDIX D

## IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

No. C80-302

No. C82-050

Filed Nov. 15, 1982

## AMENDED JUDGMENT

Upon the Court's own motion, the Judgment entered in this case on November 4, 1982 be, and the same is, hereby amended to read as follows:

The above-entitled matter coming on regularly for hearing before the Court, taxpayer plaintiffs, intervenors and two amicus curiae appearing by and through their attorneys, Robert F. Nagel, Stephen Williams, William H. Brown, Mike Sullivan, Harold Scoggins, Mark White, Stuart Fryer, George J. Domas, Gale Norton, Richard L. Krause and Brent Kunz, and defendant appearing by and through its attorneys, Robert Livingston and Robert L. Baker, and the Court having heard the evidence and having taken said matter under advisement, and having carefully considered the pleadings, testimony and exhibits relevant and material to the matters in dispute, and the memoranda submitted by counsel in support of their respective theories of the case, and having prepared and filed herein its Memorandum Opinion, finding generally in favor of the plaintiffs and intervenors and against the defendant, and being fully advised in the premises; it is

ORDERED that due to Plaintiffs and Intervenors challenge to only Title I of the Crude Oil Windfall Profit Tax Act of 1980 P.L. 96-223, April 2, 1980, it was intended by the Court that the Memorandum Opinion be directed only to Title I of that Act entitled Windfall Profit Tax on Domestic Crude Oil. Any reference to the "Act" or the "entire Act" was intended to be and is hereby restricted to Title I found at 26 U.S.C. §§ 4986 to 4998 inclusive; it is

FURTHER ORDERED that summary judgment be, and the same is hereby ordered in accordance with the Memorandum Opinion and the Windfall Profit Tax on Domestic Crude Oil, 26 U.S.C. §§ 4986 to 4998 inclusive, Title I of the Crude Oil Windfall Profit Tax Act of 1980 be, and the same is, hereby held unconstitutional; it is

FURTHER ORDERED that plaintiffs recover of and from defendant the amount of windfall profit taxes paid by plaintiffs in March of 1980 for C80-302, and from March through December 1980 in C82-050, in such sum as alleged in the Second Supplemental and Amended Complaint with interest as provided by law; it is

FURTHER ORDERED that all proceedings in this matter be stayed until a higher court has had occasion to pass upon the correctness of the trial court's decision; it is

FURTHER ORDERED that it is expressly determined that there is no just reason for delay in entry of final judgment and therefore judgment is entered accordingly.

Dated this 15th day of November, 1982.

EWING T. KERR
*United States District Judge*

## APPENDIX E

## IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

No. C80-302

HARRY PTASYNSKI, JOHN PARTRIDGE, BERTON W. AVERY, GOLDIE AVERY, FREDERICK S. JOHNSON AND CALVIN PETROLEUM CORPORATION, PLAINTIFFS

*v.*

UNITED STATES OF AMERICA, DEFENDANT

INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, ET AL., INTERVENORS

No. C82-050

JOHN PARTRIDGE, PLAINTIFF

*v.*

UNITED STATES OF AMERICA, DEFENDANT

## NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the United States of America, the Defendant above named, hereby appeals to the Supreme Court of the United States from the judgment order entered in this action on November 4, 1982 and the amended judgment orders entered in this action on November 12, and November 15, 1982.

This appeal is taken pursuant to 28 U.S.C. Section 1252.

RICHARD ALLEN STACY
*United States Attorney*

## APPENDIX F

Constitution of the United States:

ARTICLE I

Section 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

*     *     *     *     *

## APPENDIX G

Title I, Crude Oil Windfall Profit Tax Act of 1980, Pub. L. 96-223, 94 Stat. 229:

## An Act

To impose a windfall profit tax on domestic crude oil, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

### SECTION 1. SHORT TITLE; AMENDMENT OF 1954 CODE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Crude Oil Windfall Profit Tax Act of 1980".

(b) AMENDMENT OF 1954 CODE.—Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Internal Revenue Code of 1954.

(c) TABLE OF CONTENTS.—

Sec. 1. Short title; amendment of 1954 Code; table of contents.

TITLE I—WINDFALL PROFIT TAX ON DOMESTIC CRUDE OIL

Sec. 101. Windfall profit tax.

Sec. 102. Allocation of net revenues from windfall profit tax to certain uses.

Sec. 103. Study of effects of decontrol of oil prices and of windfall profit tax.

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## TITLE I—WINDFALL PROFIT TAX ON DOMESTIC CRUDE OIL

### SEC. 101. WINDFALL PROFIT TAX.

(a) IN GENERAL.—

(1) AMENDMENT OF SUBTITLE D.—Subtitle D (relating to miscellaneous excise taxes) is amended by adding at the end thereof the following new chapter:

## "CHAPTER 45—WINDFALL PROFIT TAX ON DOMESTIC CRUDE OIL

"SUBCHAPTER A. Imposition and amount of tax.
"SUBCHAPTER B. Categories of oil.
"SUBCHAPTER C. Miscellaneous provisions.

### "Subchapter A—Imposition and Amount of Tax

"Sec. 4986. Imposition of tax.
"Sec. 4987. Amount of tax.
"Sec. 4988. Windfall profit; removal price.
"Sec. 4989. Adjusted base price.
"Sec. 4990. Phaseout of tax.

### "SEC. 4986. IMPOSITION OF TAX.

"(a) IMPOSITION OF TAX.—An excise tax is hereby imposed on the windfall profit from taxable crude oil removed from the premises during each taxable period.

"(b) TAX PAID BY PRODUCER.—The tax imposed by this section shall be paid by the producer of the crude oil.

### "SEC. 4987. AMOUNT OF TAX.

"(a) IN GENERAL.—The amount of tax imposed by section 4986 with respect to any barrel of taxable crude oil shall be the applicable percentage of the windfall profit on such barrel.

"(b) APPLICABLE PERCENTAGE.—For purposes of subsection (a)—

"(1) GENERAL RULE FOR TIERS 1 AND 2.—The applicable percentage for tier 1 oil and tier 2 oil which is not independent producer oil is—

| | |
|---|---|
| "Tier 1 | 70 |
| "Tier 2 | 60 |

"(2) INDEPENDENT PRODUCER OIL.—The applicable percentage for independent producer oil which is tier 1 oil or tier 2 oil is—

| | |
|---|---|
| "Tier 1 | 50 |
| "Tier 2 | 30 |

"(3) TIER 3 OIL.—The applicable percentage for tier 3 oil is 30 percent.

"(c) FRACTIONAL PART OF BARREL.—In the case of a fraction of a barrel, the tax imposed by section 4986 shall

be the same fraction of the amount of such tax imposed on the whole barrel.

**"SEC. 4988. WINDFALL PROFIT; REMOVAL PRICE.**

"(a) GENERAL RULE.—For purposes of this chapter, the term 'windfall profit' means the excess of the removal price of the barrel of crude oil over the sum of—

"(1) the adjusted base price of such barrel, and

"(2) the amount of the severance tax adjustment with respect to such barrel provided by section 4996(c).

"(b) NET INCOME LIMITATION ON WINDFALL PROFIT.—

"(1) IN GENERAL.—The windfall profit on any barrel of crude oil shall not exceed 90 percent of the net income attributable to such barrel.

"(2) DETERMINATION OF NET INCOME.—For purposes of paragraph (1), the net income attributable to a barrel shall be determined by dividing—

"(A) the taxable income from the property for the taxable year attributable to taxable crude oil, by

"(B) the number of barrels of taxable crude oil from such property taken into account for such taxable year.

"(3) TAXABLE INCOME FROM THE PROPERTY.—For purposes of paragraph (2)—

"(A) IN GENERAL.—Except as otherwise provided in this paragraph, the taxable income from the property shall be determined under section 613(a).

"(B) CERTAIN DEDUCTIONS NOT ALLOWED.—No deduction shall be allowed for—

"(i) depletion,

"(ii) the tax imposed by section 4986,

"(iii) section 263(c) costs, or

"(iv) qualified tertiary injectant expenses to which an election under subparagraph (E) applies.

"(C) TAXABLE INCOME REDUCED BY COST DEPLETION.—Taxable income shall be reduced by the cost depletion which would have been allowable for the taxable year with respect to the property if—

"(i) all—

"(I) section 263(c) costs, and

"(II) qualified tertiary injectant expenses to which an election under subparagraph (E) applies, incurred by the taxpayer have been capitalized and taken into account in computing cost depletion, and

"(ii) cost depletion had been used by the taxpayer with respect to such property for all taxable periods.

"(D) SECTION 263(c) COSTS.—For purposes of this paragraph, the term 'section 263(c) costs' means intangible drilling and development costs incurred by the taxpayer which (by reason of an election under section 263(c)) may be deducted as expenses for purposes of this title (other than this paragraph). Such term shall not include costs incurred in drilling a nonproductive well.

"(E) ELECTION TO CAPITALIZE QUALIFIED TERTIARY INJECTANT EXPENSES.—

"(i) IN GENERAL.—Any taxpayer may elect, with respect to any property, to capitalize qualified tertiary injectant expenses for purposes of this paragraph. Any such election shall apply to all qualified tertiary injectant expenses allocable to the property for which the election is made, and may be revoked only with the consent of the Secretary. Any such election shall be made at such time and in such manner as the Secretary shall by regulations prescribe.

"(ii) QUALIFIED TERTIARY INJECTANT EXPENSES.— The term 'qualified tertiary injectant expenses' means any expense allowable as a deduction under section 193.

"(4) SPECIAL RULE FOR APPLYING PARAGRAPH (3)(C) TO CERTAIN TRANSFERS OF PROVEN OIL OR GAS PROPERTIES.—

"(A) IN GENERAL.—In the case of any proven oil or gas property transfer which (but for this subparagraph), would result in an increase in the amount determined under paragraph (3)(C) with respect to the transferee, paragraph (3)(C) shall be applied with respect to the transferee by taking into account only those amounts which would have been allowable with

respect to the transferor under paragraph (3)(C) and those costs incurred during periods after such transfer.

"(B) PROVEN OIL OR GAS PROPERTY TRANSFER.—For purposes of subparagraph (A), the term 'proven oil or gas property transfer' means any transfer (including the subleasing of a lease or the creation of a production payment which gives the transferee an economic interest in the property) after 1978 of an interest (including an interest in a partnership or trust) in any proven oil or gas property (within the meaning of section 613A(c)(9)(A)).

"(5) SPECIAL RULE WHERE THERE IS PRODUCTION PAYMENT.—For purposes of paragraph (2), if any portion of the taxable crude oil removed from the property is applied in discharge of a production payment, the gross income from such portion shall be included in the gross income from the property of both the person holding such production payment and the person holding the interest from which such production payment was created.

"(c) REMOVAL PRICE.—For purposes of this chapter—

"(1) IN GENERAL.—Except as otherwise provided in this subsection, the term 'removal price' means the amount for which the barrel is sold.

"(2) SALES BETWEEN RELATED PERSONS.—In the case of a sale between related persons (within the meaning of section 103(b)(6)(C)), the removal price shall not be less than the constructive sales price for purposes of determining gross income from the property under section 613.

"(3) OIL REMOVED FROM PREMISES BEFORE SALE.—If crude oil is removed from the premises before it is sold, the removal price shall be the constructive sales price for purposes of determining gross income from the property under section 613.

"(4) REFINING BEGUN ON PREMISES.—If the manufacture or conversion of crude oil into refined products begins before such oil is removed from the premises—

"(A) such oil shall be treated as removed on the day such manufacture or conversion begins, and

"(B) the removal price shall be the constructive sales price for purposes of determining gross income from the property under section 613.

"(5) MEANING OF TERMS.—The terms 'premises' and 'refined product' have the same meaning as when used for purposes of determining gross income from the property under section 613.

**"SEC. 4989. ADJUSTED BASE PRICE.**

"(a) ADJUSTED BASE PRICE DEFINED.—For purposes of this chapter, the term 'adjusted base price' means the base price for the barrel of crude oil plus an amount equal to—

"(1) such base price, multiplied by

"(2) the inflation adjustment for the calendar quarter in which the crude oil is removed from the premises.

The amount determined under the preceding sentence shall be rounded to the nearest cent.

"(b) INFLATION ADJUSTMENT.—

"(1) IN GENERAL.—For purposes of subsection (a), the inflation adjustment for any calendar quarter is the percentage by which—

"(A) the implicit price deflator for the gross national product for the second preceding calendar quarter, exceeds

"(B) such deflator for the calendar quarter ending June 30, 1979.

"(2) ADDITIONAL ADJUSTMENT FOR TIER 3 OIL.—The adjusted base price for tier 3 oil shall be determined by substituting for the implicit price deflator referred to in paragraph (1)(A) an amount equal to such deflator multiplied by 1.005 to the nth power where 'n' equals the number of calendar quarters beginning after September 1979 and before the calendar quarter in which the oil is removed from the premises.

"(3) FIRST REVISION OF PRICE DEFLATOR USED.—For purposes of paragraphs (1) and (2), the first revision of the price deflator shall be used.

"(c) BASE PRICE FOR TIER 1 OIL.—For purposes of this chapter, the base price for tier 1 oil is—

"(1) the ceiling price which would have applied to such oil under the March 1979 energy regulations if it had been produced and sold in May 1979 as upper tier oil, reduced by

"(2) 21 cents.

"(d) BASE PRICES FOR TIER 2 OIL AND TIER 3 OIL.—For purposes of this chapter—

"(1) GENERAL RULE.—Except as provided in paragraph (2), the base prices for tier 2 oil and tier 3 oil shall be prices determined pursuant to the method prescribed by the Secretary by regulations. Any method so prescribed shall be designed so as to yield, with respect to oil of any grade, quality, and field, a base price which approximates the price at which such oil would have sold in December 1979 if—

"(A) all domestic crude oil were uncontrolled, and

"(B) the average removal price for all domestic crude oil (other than Sadlerochit oil) were—

"(i) $15.20 a barrel for purposes of determining base prices for tier 2 oil, and

"(ii) $16.55 a barrel for purposes of determining base prices for tier 3 oil.

"(2) INTERIM RULE.—For months beginning before October 1980 (or such earlier date as may be provided in regulations taking effect before such earlier date), the base prices for tier 2 oil and tier 3 oil, respectively, shall be the product of—

"(A)(i) the highest posted price for December 31, 1979, for uncontrolled crude oil of the same grade, quality, and field, or

"(ii) if there is no posted price described in clause (i), the highest posted price for such date for uncontrolled crude oil at the nearest domestic field for which prices for oil of the same grade and quality were posted for such date, multiplied by

"(B) a fraction the denominator of which is $35, and the numerator of which is—

"(i) $15.20 for purposes of determining base prices for tier 2 oil, and

"(ii) $16.55 for purposes of determining base prices for tier 3 oil.

For purposes of the preceding sentence, no price which was posted after January 14, 1980, shall be taken into account.

"(3) MINIMUM INTERIM BASE PRICE.—The base price determined under paragraph (2) of tier 2 oil or tier 3 oil shall not be less than the sum of—

"(A) the ceiling price which would have applied to such oil under the March 1979 energy regulations if it had been produced and sold in May 1979 as upper tier oil, plus

"(B)(i) $1 in the case of tier 2 oil, or

"(ii) $2 in the case of tier 3 oil.

### "SEC. 4990. PHASEOUT OF TAX.

"(a) PHASEOUT.—Notwithstanding any other provision of this chapter, the tax imposed by this chapter with respect to any crude oil removed from the premises during any month during the phaseout period shall not exceed—

"(1) the amount of tax which would have been imposed by this chapter with respect to such crude oil but for this subsection, multiplied by

"(2) the phaseout percentage for such month.

"(b) TERMINATION OF TAX.—Notwithstanding any other provision of this chapter, no tax shall be imposed by this chapter with respect to any crude oil removed from the premises after the phaseout period.

"(c) DEFINITIONS.—For purposes of this section—

"(1) PHASEOUT PERIOD.—The term 'phaseout period' means the 33-month period beginning with the month following the target month.

"(2) PHASEOUT PERCENTAGE.—The phaseout percentage for any month is 100 percent reduced by 3 percentage points for each month after the target month and before the month following the month for which the phaseout percentage is being determined.

"(3) TARGET MONTH.—The term 'target month' means the later of—

"(A) December 1987, or

"(B) the first month for which the Secretary publishes an estimate under subsection (d)(2).

In no event shall the target month be later than December 1990.

"(d) Determination of Aggregate Net Windfall Revenue.—

"(1) Estimate by the secretary.—For each month after 1986, the Secretary shall make an estimate of the aggregate net windfall revenue as of the close of such month. Any such estimate shall be made during the preceding month and shall be made on the basis of the best available data as of the date of making such estimate.

"(2) Publication.—If the Secretary estimates under paragraph (1) that the aggregate net windfall revenue as of the close of any month will exceed $227,300,000,000, the Secretary shall (not later than the last day of the preceding month) publish notice in the Federal Register that he has made such an estimate for such month.

"(3) Aggregate net windfall revenue defined.—For purposes of this subsection, the term 'aggregate net windfall revenue' means the amount which the Secretary estimates to be the excess of—

"(A) the gross revenues from the tax imposed by section 4986 during the period beginning on March 1, 1980, and ending on the last day of the month for which the estimate is being made, over

"(B) the sum of—

"(i) the refunds of and other adjustments to such tax for such period, plus

"(ii) the decrease in the income taxes imposed by chapter 1 resulting from the tax imposed by section 4986.

For purposes of subparagraph (A), there shall not be taken into account any revenue attributable to an economic interest in crude oil held by the United States.

## "Subchapter B—Categories of Oil

"Sec. 4991. Taxable crude oil; categories of oil.
"Sec. 4992. Independent producer oil.
"Sec. 4993. Incremental tertiary oil.

"Sec. 4994. Definitions and special rules relating to exemptions.

**"SEC. 4991. TAXABLE CRUDE OIL; CATEGORIES OF OIL.**

"(a) TAXABLE CRUDE OIL.—For purposes of this chapter, the term 'taxable crude oil' means all domestic crude oil other than exempt oil.

"(b) EXEMPT OIL.—For purposes of this chapter, the term 'exempt oil' means—

"(1) any crude oil from a qualified governmental interest or a qualified charitable interest.

"(2) any exempt Indian oil,

"(3) any exempt Alaskan oil, and

"(4) any exempt front-end oil.

"(c) TIER 1 OIL.—For purposes of this chapter, the term 'tier 1 oil' means any taxable crude oil other than—

"(1) tier 2 oil, and

"(2) tier 3 oil.

"(d) TIER 2 OIL.—For purposes of this chapter—

"(1) IN GENERAL.—Except as provided in paragraph (2), the term 'tier 2 oil' means—

"(A) any oil which is from a stripper well property within the meaning of the June 1979 energy regulations, and

"(B) any oil from an economic interest in a National Petroleum Reserve held by the United States.

"(2) EXCLUSION OF CERTAIN OIL.—The term 'tier 2 oil' does not include tier 3 oil.

"(e) TIER 3 OIL.—For purposes of this chapter—

"(1) IN GENERAL.—The term 'tier 3 oil' means—

"(A) newly discovered oil,

"(B) heavy oil, and

"(C) incremental tertiary oil.

"(2) NEWLY DISCOVERED OIL.—The term 'newly discovered oil' has the meaning given to such term by the June 1979 energy regulations.

"(3) HEAVY OIL.—The term 'heavy oil' means all crude oil which is produced from a property if crude oil produced and sold from such property during—

"(A) the last month before July 1979 in which crude oil was produced and sold from such property, or

"(B) the taxable period,

had a weighted average gravity of 16 degrees API or less (corrected to 60 degrees Fahrenheit).

"(4) INCREMENTAL TERTIARY OIL.—

"For definition of incremental tertiary oil, see section 4993.

## "SEC. 4992. INDEPENDENT PRODUCER OIL.

"(a) GENERAL RULE.—For purposes of this chapter, the term 'independent producer oil' means that portion of an independent producer's qualified production for the quarter which does not exceed such person's independent producer amount for such quarter.

"(b) INDEPENDENT PRODUCER DEFINED.—For purposes of this section—

"(1) IN GENERAL.—The term 'independent producer' means, with respect to any quarter, any person other than a person whom subsection (c) of section 613A does not apply by reason of paragraph (2) (relating to certain retailers) or paragraph (4) (relating to certain refiners) of section 613A(d).

"(2) RULES FOR APPLYING PARAGRAPHS (2) AND (4) OF SECTION 613A(d).—For purposes of paragraph (1), paragraphs (2) and (4) of section 613A(d) shall be applied—

"(A) by substituting 'quarter' for 'taxable year' each place it appears in such paragraphs, and

"(B) by substituting '$1,250,000' for '$5,000,000' in paragraph (2) of section 613A(d).

"(c) INDEPENDENT PRODUCER AMOUNT.—For purposes of this section—

"(1) IN GENERAL.—A person's independent producer amount for any quarter is the product of—

"(A) 1,000 barrels, multiplied by

"(B) the number of days in such quarter (31 in the case of first quarter of 1980).

"(2) PRODUCTION EXCEEDS AMOUNT. If a person's qualified production for any quarter exceeds such person's independent producer amount for such quarter, the independent producer amount shall be allocated—

"(A) between tiers 1 and 2 in proportion to such person's production for such quarter of domestic crude oil in each such tier, and

"(B) within any tier, on the basis of the removal prices for such person's domestic crude oil in such tier removed during such quarter, beginning with the highest of such prices.

"(d) QUALIFIED PRODUCTION OF OIL DEFINED.—For purposes of this section—

"(1) IN GENERAL.—An independent producer's qualified production of oil for any quarter is the number of barrels of taxable crude oil—

"(A) of which such person is the producer,

"(B) which is removed during such quarter,

"(C) which is tier 1 oil or tier 2 oil, and

"(D) which is attributable to the independent producer's working interest in a property.

"(2) WORKING INTEREST DEFINED.—

"(A) IN GENERAL.—The term 'working interest' means an operating mineral interest (within the meaning of section 614(d))—

"(i) which was in existence as such an interest on January 1, 1980, or

"(ii) which is attributable to a qualified overriding royalty interest.

"(B) QUALIFIED OVERRIDING ROYALTY INTEREST.—For purposes of subparagraph (A)(ii), the term 'qualified overriding royalty interest' means an overriding royalty interest in existence as such an interest on January 1, 1980, but only if on February 20, 1980, there was in existence a binding contract under which such interest was to be converted into an operating mineral interest (within the meaning of section 614(d)).

"(3) PRODUCTION FROM TRANSFERRED PROPERTY.—

"(A) IN GENERAL.—Except as otherwise provided in this paragraph, in the case of a transfer on or after January 1, 1980, of an interest in any property, the qualified production of the transferee shall not include any production attributable to such interest.

"(B) SMALL PRODUCER TRANSFER EXEMPTION.—

"(i) IN GENERAL.—Subparagraph (A) shall not apply to any transfer of an interest in property if the transferee establishes (in such manner as may be prescribed by the Secretary by regulations) that at no time after December 31, 1979, has the property been held by a person who was a disqualified transferor for any quarter ending after September 30, 1979, and ending before the date such person transferred the interest.

"(ii) DISQUALIFIED TRANSFEROR.—The term 'disqualified transferor' means, with respect to any quarter, any person who—

"(I) had qualified production for such quarter which exceeded such person's independent producer amount for such quarter, or

"(II) was not an independent producer for such quarter.

"(iii) SPECIAL RULES.—For purposes of this paragraph—

"(I) PROPERTY HELD BY PARTNERSHIPS.—Property held by a partnership at any time shall be treated as owned proportionately by the partners of such partnership at such time.

"(II) PROPERTY HELD BY TRUST OR ESTATE.—Property held by any trust or estate shall be treated as owned both by such trust or estate and proportionately by its beneficiaries.

"(III) CONSTRUCTIVE APPLICATION.—This chapter shall be treated as having been in effect for periods after September 30, 1979, for purposes of making any determination under subclause (I) or (II) of clause (ii).

"(C) OTHER EXCEPTIONS.—Subparagraph (A) shall not apply in the case of—

"(i) a transfer of property at death,

"(ii) a change of beneficiaries of a trust which qualifies under clause (iii) of section 613A(c)(9)(B) (determined without regard to the exception at the end of such clause), and

"(iii) any transfer so long as the transferor and transferee are required by subsection (e) to share the 1,000 barrel amount contained in subsection (c)(1)(A).

The preceding sentence shall apply in the case of any property only if the production from the property was qualified production for the transferor.

"(D) TRANSFERS INCLUDE SUBLEASES, ETC.—For purposes of this paragraph—

"(i) a sublease shall be treated as a transfer, and

"(ii) an interest in a partnership or trust shall be treated as an interest in property held by the partnership or trust.

"(e) ALLOCATION WITHIN RELATED GROUP.—

"(1) IN GENERAL. In the case of persons who are members of the same related group at any time during any quarter, the 1,000 barrel amount contained in subsection (c)(1)(A) for days during such quarter shall be reduced for each such person by allocating such amount among all such persons in proportion to their respective qualified production for such quarter.

"(2) RELATED GROUP.—For purposes of this subsection, persons shall be treated as members of a related group if they are described in any of the following clauses:

"(A) a family,

"(B) a controlled group of corporations,

"(C) a group of entities under common control, or

"(D) if 50 percent or more of the beneficial interest in 1 or more corporations, trusts, or estates is owned by the same family, all such entities and such family.

"(3) DEFINITIONS AND SPECIAL RULES.—For purposes of this subsection—

"(A) CONROLLED GROUP OF CORPORATIONS.—The term 'controlled group of corporations' has the meaning given such term by section 613A(c)(8)(D)(i).

"(B) GROUP OF ENTITIES UNDER COMMON CONTROL.—The term 'group of entities under common control' means any group of corporations, trusts, or estates which (as determined under regulations pre-

scribed by the Secretary) are under common control. Such regulations shall be based on principles similar to the principles which apply under subparagraph (A).

"(C) FAMILY.—The term 'family' means an individual and the spouse and minor children of such individual.

"(D) CONSTRUCTIVE OWNERSHIP.—For purposes of paragraph (2)(D), an interest owned by or for a corporation, partnership, trust, or estate shall be considered as owned directly by the entity and proportionately by its shareholders, partners, or beneficiaries, as the case may be.

"(E) MEMBERS OF MORE THAN 1 RELATED GROUP.—If a person is a member of more than 1 related group during any quarter, the determination of such person's allocation under paragraph (1) shall be made by reference to the related group which results in the smallest allocation for such person.

"SEC. 4993. INCREMENTAL TERTIARY OIL.

"(a) IN GENERAL.—For purposes of this chapter, the term 'incremental tertiary oil' means the excess of—

"(1) the amount of crude oil which is removed from a property during any month and which is produced on or after the project beginning date and during the period for which a qualified tertiary recovery project is in effect on the property, over

"(2) the base level for such property for such month.

"(b) DETERMINATION OF AMOUNT.—For purposes of this section—

"(1) BASE LEVEL.—The base level for any property for any month is the average monthly amount (determined under rules similar to rules used in determining the base production control level under the June 1979 energy regulations) of crude oil removed from such property during the 6-month period ending March 31, 1979, reduced (but not below zero) by the sum of—

"(A) 1 percent of such amount for each month which begins after 1978 and before the first month which begins after 1978 and before the first month beginning after the project beginning date, and

"(B) 2½ percent of such amount for each month which begins after the project beginning date (or after 1978 if the project beginning date is before 1979) and before the month for which the base level is being determined.

"(2) MINIMUM AMOUNT IN CASE OF PROJECTS CERTIFIED BY DOE.—In the case of a project described in subsection (c)(1)(A), for the period during which the project is in effect, the amount of the incremental tertiary oil shall not be less than the incremental production determined under the June 1979 energy regulations.

"(3) ALLOCATION RULES.—The determination of which barrels of crude oil removed during any month are incremental tertiary oil shall be made—

"(A) first by allocating the amount of incremental tertiary oil between—

"(i) oil which (but for this subsection) would be tier 1 oil, and

(ii) oil which (but for this subsection) would be tier 2 oil,

in proportion to the respective amounts of each such oil removed from the property during such month, and

"(B) then by taking into account barrels of crude oil so removed in the order of their respective removal prices, beginning with the highest of such prices.

"(c) QUALIFIED TERTIARY RECOVERY PROJECT.—For purposes of this section—

"(1) IN GENERAL.—The term 'qualified tertiary recovery project' means—

"(A) a qualified tertiary enhanced recovery project with respect to which a certification as such has been approved and is in effect under the June 1979 energy regulations, or

"(B) any project for enhancing recovery of crude oil which meets the requirements of paragraph (2).

"(2) REQUIREMENTS.—A project meets the requirements of this paragraph if—

"(A) the project involves the application (in accordance with sound engineering principles) of 1 or more tertiary recovery methods which can reasonably be ex-

pected to result in more than an insignificant increase in the amount of crude oil which will ultimately be recovered,

"(B) the project beginning date is after May 1979,

"(C) the portion of the property to be affected by the project is adequately delineated,

"(D) the operator submits (at such time and in such manner as the Secretary may by regulations prescribe) to the Secretary—

"(i) a certification from a petroleum engineer that the project meets the requirements of subparagraphs (A), (B), and (C), or

"(ii) a certification that a jurisdictional agency (within the meaning of subsection (d)(5)) has approved the project as meeting the requirements of subparagraphs (A), (B), and (C), and that such approval is still in effect, and

"(E) the operator submits (at such time and such manner as the Secretary may by regulations prescribe) to the Secretary a certification from a petroleum engineer that the project continues to meet the requirements of subparagraphs (A), (B), and (C).

"(d) DEFINITIONS AND SPECIAL RULES.—For purposes of this section—

"(1) TERTIARY RECOVERY METHOD.—The term 'tertiary recovery method' means—

"(A) any method which is described in subparagraphs (1) through (9) of section 212.78(c) of the June 1979 energy regulations, or

"(B) any other method to provide tertiary enhanced recovery which is approved by the Secretary for purposes of this chapter.

"(2) PROJECT BEGINNING DATE.—The term 'project beginning date' means the later of—

"(A) the date on which the injection of liquids, gases, or other matter begins, or

"(B) the date on which—

"(i) in the case of a project described in subsection (c)(1)(A), the project is certified as a qualified terti-

ary enhanced recovery project under the June 1979 energy regulations, or

"(ii) in the case of a project described in subsection (c)(1)(B), a petroleum engineer certifies, or a jurisdictional agency approves, the project as meeting the requirements of subparagraphs (A), (B), and (C) of subsection (c)(2).

"(3) PROJECT ONLY AFFECTS PORTION OF PROPERTY.—If a qualified tertiary recovery project can reasonably be expected to increase the ultimate recovery of crude oil from only a portion of a property, such portion shall be treated as a separate property.

"(4) SIGNIFICANT EXPANSION TREATED AS SEPARATE PROJECT.—A significant expansion of any project shall be treated as a separate project.

"(5) JURISDICTIONAL AGENCY.—The term 'jurisdictional agency' means—

"(A) in the case of an application involving a tertiary recovery project on lands not under Federal jurisdiction—

"(i) the appropriate State agency in the State in which such lands are located which is designated by the Governor of such State in a written notification submitted to the Secretary as the agency which will approve projects under this subsection, or

"(ii) if the Governor of such State does not submit such written notification within 180 days after the date of the enactment of the Crude Oil Windfall Project Tax Act of 1980, the United States Geological Survey (until such time as the Governor submits such notification), or

"(B) in the case of an application involving a tertiary recovery project on lands under Federal jurisdiction, the United States Geological Survey.

"(6) BASIS OF REVIEW OF CERTAIN QUALIFIED TERTIARY RECOVERY PROJECTS.—In the case of any project which is approved under subsection (c)(2)(D)(ii) and for which a certification is submitted to the Secretary, the project shall be considered as meeting the requirements

of subparagraphs (A), (B), and (C) of subsection (c)(2) unless the Secretary determines that—

"(A) the approval of the jurisdictional agency was not supported by substantial evidence on the record upon which such approval was based, or

"(B) additional evidence not contained in the record upon which such approval was based demonstrates that such project does not meet the requirements of subparagraph (A), (B), or (C) of subsection (c)(2).

If the Secretary makes a determination described in subparagraph (A) or (B) of the preceding sentence, the determination of whether the project meets the requirements of subparagraphs (A), (B), and (C) of subsection (c)(2) shall be made without regard to the preceding sentence.

"(7) RULINGS RELATING TO CERTAIN QUALIFIED TERTIARY RECOVERY PROJECTS.—In the case of any tertiary recovery project for which a certification is submitted to the Secretary under subsection (c)(2)(D)(ii), a taxpayer may request a ruling from the Secretary with respect to whether such project is a qualified tertiary recovery project. The Secretary shall issue such ruling within 180 days of the date after he receives the request and such information as may be necessary to make a determination.

## "SEC. 4994. DEFINITIONS AND SPECIAL RULES RELATING TO EXEMPTIONS.

"(a) QUALIFIED GOVERNMENTAL INTEREST.—For purposes of section 4991(b)—

"(1) IN GENERAL.—The term 'qualified governmental interest' means an economic interest in crude oil if—

"(A) such interest is held by a State or political subdivision thereof or by an agency or instrumentality of a State or political subdivision thereof, and

"(B) under the applicable State or local law, all of the net income received pursuant to such interest is dedicated to a public purpose.

"(2) NET INCOME.—For purposes of this paragraph, the term 'net income' means gross income reduced by

production costs, and severance taxes of general application, allocable to the interest.

"(3) AMOUNTS PLACED IN CERTAIN PERMANENT FUNDS TREATED AS DEDICATED TO PUBLIC PURPOSE.—The requirements of paragraph (1)(B) shall be treated as met with respect to any net income which, under the applicable State or local law, is placed in a permanent fund the earnings on which are dedicated to a public purpose.

"(b) QUALIFIED CHARITABLE INTEREST.—For purposes of section 4991(b)

"(1) IN GENERAL.—The term 'qualified charitable interest' means an economic interest in crude oil if—

"(A) such interest is—

"(i) held by an organization described in clause (ii), (iii), or (iv) of section 170(b)(1)(A) which is also described in section 170(c)(2), or

"(ii) held—

"(I) by an organization described in clause (i) of section 170(b)(1)(A) which is also described in section 170(c)(2), and

"(II) for the benefit of an organization described in clause (i) of this subparagraph, and

"(B) such interest was held by the organization described in clause (i) or subclause (I) of clause (ii) of subparagraph (A) on January 21, 1980, and at all times thereafter before the last day of the taxable period.

"(2) SPECIAL RULE.—For purposes of paragraph (1)(A)(ii), an interest shall be treated as held for the benefit of an organization described in paragraph (1)(A)(i) only if all the proceeds from such interest were dedicated on January 21, 1980, and at all times thereafter before the last day of the taxable period, to the organization described in paragraph (1)(A)(i).

"(c) FRONT-END TERTIARY OIL.—

"(1) EXEMPTION FOR TERTIARY PROJECTS OF INDEPENDENTS.—For purposes of this chapter, the term 'exempt front-end oil' means any domestic crude oil—

"(A) which is removed from the premises before October 1, 1981, and

"(B) which is treated as front-end oil by reason of a front-end tertiary project on one or more properties each of which is a qualified property.

"(2) REFUNDS FOR TERTIARY PROJECTS OF INTEGRATED PRODUCERS.—

"(A) IN GENERAL.—In the case of any front-end tertiary project which does not meet the requirements of paragraph (1)(B), the excess of—

"(i) the allowed expenses of the taxpayer with respect to such project, over

"(ii) the tertiary incentive revenue,

shall be treated as a payment by the taxpayer with respect to the tax imposed by this chapter made on September 30, 1981.

"(B) LIMITATION BASED ON AMOUNT OF TAX.—The amount of the payment determined under subparagraph (A) with respect to any producer shall not exceed the aggregate tax imposed by section 4986 with respect to front-end oil of that producer removed after February 1980 and before October 1981.

"(C) TERTIARY INCENTIVE REVENUE.—For purposes of this paragraph, the term 'tertiary incentive revenue' has the meaning given such term by the front-end tertiary provisions of the energy regulations.

"(3) DEFINITION OF ALLOWED EXPENSES; PREPAID EXPENSES NOT TAKEN INTO ACCOUNT.—For purposes of this subsection (including the application of the front-end tertiary provisions for purposes of this subsection)—

"(A) ALLOWED EXPENSES.—Except as provided in subparagraph (B), allowed expenses shall be determined under the front-end tertiary provisions of the energy regulations.

"(B) PREPAID EXPENSES NOT TAKEN INTO ACCOUNT.—The term 'allowed expenses' shall not include any amount attributable to periods after September 30, 1981.

"(C) PERIOD TO WHICH ITEM IS ATTRIBUTABLE.—For purposes of subparagraph (B)—

"(i) any injectant and any fuel shall be treated as attributable to periods before October 1, 1981, if the injectant is injected, or the fuel is used, before October 1, 1981, and

"(ii) any other item shall be treated as attributable to periods before October 1, 1981, only to the extent that under chapter 1 deductions for such item (including depreciation in respect of such items) are properly allocable to periods before October 1, 1981.

For purposes of the preceding sentence, an act shall be treated as taken before a date if it would have been taken before such date but for an act of God, a severe mechanical breakdown, or an injunction.

"(4) DEFINITIONS AND SPECIAL RULES.—For purposes of this subsection—

"(A) FRONT-END TERTIARY PROVISIONS.—The term 'front-end tertiary provisions' means—

"(i) the provisions of section 212.78 of the energy regulations which exempt crude oil from ceiling price limitations to provide financing for tertiary projects (as such provisions took effect on October 1, 1979), and

"(ii) any modification of such provisions, but only to the extent that such modification is for purposes of coordinating such provisions with the tax imposed by this chapter.

"(B) FRONT-END OIL.—The term 'front-end oil' means any domestic crude oil which is not subject to a first sale ceiling price under the energy regulations solely by reason of the front-end tertiary provisions of such regulations.

"(C) QUALIFIED PROPERTY.—The term 'qualified property' means any property if, on January 1, 1980, 50 percent or more of the operating mineral interest in such property is held by persons who were independent producers (within the meaning of section 4992(b)) for the last quarter of 1979.

"(D) FRONT-END TERTIARY PROJECT.—The term 'front-end tertiary project' means any project which qualifies under the front-end tertiary provisions of the energy regulations.

"(E) ORDERING RULE.—Front-end oil of any taxpayer shall be treated as attributable first to projects which meet the requirements of paragraph (1)(B).

"(d) EXEMPT INDIAN OIL.—For purposes of this chapter, the term 'exempt Indian oil' means any domestic crude oil—

"(1) the producer of which is an Indian tribe, an individual member of an Indian tribe, or an Indian tribal organization under an economic interest held by such a tribe, member, or organization on January 21, 1980, and which is produced from mineral interests which are—

"(A) held in trust by the United States for the tribe, member, or organization, or

"(B) held by the tribe, member, or organization subject to a restriction on alienation imposed by the United States because it is held by an Indian tribe, an individual member of an Indian tribe, or an Indian tribal organization,

"(2) the producer of which is a native corporation organized under the Alaska Native Claims Settlement Act (as in effect on January 21, 1980), and which—

"(A) is produced from mineral interests held by the corporation which were received under that Act, and

"(B) is removed from the premises before 1992, or

"(3) the proceeds from the sale of which are deposited in the Treasury of the United States to the credit of tribal or native trust funds pursuant to a provision of law in effect on January 21, 1980.

"(e) EXEMPT ALASKAN OIL.—For purposes of this chapter, the term 'exempt Alaskan oil' means any crude oil (other than Sadlerochit oil) which is produced—

"(1) from a reservoir from which oil has been produced in commercial quantities through a well located north of the Arctic Circle, or

"(2) from a well located on the northerly side of the divide of the Alaska-Aleutian Range and at least 75 miles from the nearest point on the Trans-Alaska Pipeline System.

**"Subchapter C—Miscellaneous Provisions**

"Sec. 4995. Withholding; depositary requirements.
"Sec. 4996. Other definitions and special rules.
"Sec. 4997. Records and information; regulations.
"Sec. 4998. Cross references.

**"SEC. 4995. WITHHOLDING; DEPOSITARY REQUIREMENTS.**

"(a) WITHHOLDING BY PURCHASER.—

"(1) WITHHOLDING REQUIRED.—Except to the extent provided in regulations prescribed by the Secretary—

"(A) the first purchaser of any domestic crude oil shall withhold a tax equal to the amount of the tax imposed by section 4986 with respect to such oil from amounts payable by such purchaser to the producer of such oil, and

"(B) the first purchaser of such oil shall be liable for the payment of the tax required to be withheld under subparagraph (A) and shall not be liable to any person for the amount of any such payment.

"(2) DETERMINATION OF AMOUNT TO BE WITHHELD.—

"(A) IN GENERAL.—The purchaser shall determine the amount to be withheld under paragraph (1)—

"(i) on the basis of the certification furnished to the purchaser under section 6050C, unless the purchaser has reason to believe that any information contained in such certification is not correct, or

"(ii) if clause (i) does not apply, under regulations prescribed by the Secretary.

"(B) NET INCOME LIMITATION NOT TO BE APPLIED.—For purposes of determining the amount to be withheld under paragraph (1), subsection (b) of section 4988 shall not apply.

"(3) ADJUSTMENTS FOR WITHHOLDING ERRORS.—

"(A) IN GENERAL.—To the extent provided in regulations prescribed by the Secretary, withholding er-

rors made by a purchaser with respect to the crude oil of a producer removed during any calendar year shall be corrected by that purchaser by making proper adjustments in the amounts withheld from subsequent payments to such producer for crude oil removed during the same calendar year.

"(B) WITHHOLDING ERROR.—For purposes of subparagraph (A), there is a withholding error if the amount withheld by the purchaser under paragraph (1) with respect to any payment for any crude oil exceeds (or is less than) the tax imposed by section 4986 with respect to such oil (determined without regard to section 4988(b)).

"(C) LIMITATION ON AMOUNT OF ADJUSTMENTS.—No adjustment shall be required under subparagraph (A) with respect to any payment for any crude oil to the extent that such adjustment would result in amounts withheld from such payment in excess of the windfall profit from such crude oil.

"(D) VOLUNTARY WITHHOLDING.—The Secretary may by regulations provide for withholding under this subsection of additional amounts from payments by any purchaser to any producer if the purchaser and producer agree to such withholding. For purposes of this title, any amount withheld pursuant to such an agreement shall be treated as an amount required to be withheld under paragraph (1).

"(4) PRODUCER TREATED AS HAVING PAID WITHHELD AMOUNT.—

"(A) IN GENERAL.—The producer of any domestic crude oil shall be treated as having paid any amount withheld with respect to such oil under this subsection.

"(B) TIME PAYMENT DEEMED MADE.—The producer shall be treated as having made any payment described in subparagraph (A) on the last day of the first February after the calendar year in which the oil is removed from the premises.

"(5) PRODUCER REQUIRED TO FILE RETURN ONLY TO EXTENT PROVIDED IN REGULATIONS.—Except to the ex-

tent provided in regulations, the producer of crude oil with respect to which withholding is required under paragraph (1) shall not be required to file a return of the tax imposed by section 4986 with respect to such oil.

"(6) PURCHASER'S QUARTERLY RETURNS TO CONTAIN SUMMARY.—The purchaser's return of tax under this chapter for any calendar quarter of any calendar year shall contain such information (with respect to such quarter and the prior quarters of such calendar year) as may be necessary to facilitate the coordination of the withholding of tax by such purchaser with respect to each producer with the determination of the tax imposed by section 4986 with respect to such producer.

"(7) ELECTION FOR PURCHASER AND OPERATOR TO HAVE OPERATOR TAKE PLACE OF PURCHASER.—

"(A) IN GENERAL.—If the purchaser of domestic crude oil and the operator of the property from which the crude oil was produced make a joint election under this paragraph with respect to such property (or portion thereof)—

"(i) the operator shall be substituted for the purchaser for purposes of applying this subsection and subsection (b) (and so much of subtitle F as relates to such subsections), and

"(ii) if the operator is not an integrated oil company, the operator shall be treated as having the same status as the purchaser for purposes of applying subsection (b) with respect to amounts withheld by the operator by reason of such election.

"(B) REGULATIONS MAY LIMIT ELECTION.—The Secretary may by regulations limit the circumstances under which an election under this paragraph may be made to situations where substituting the operator for the purchaser is administratively more practicable.

"(8) NO ASSESSMENTS OR REFUNDS BEFORE CLOSE OF THE YEAR.—Except to the extent provided in regulations prescribed by the Secretary, in the case of any oil subject to withholding under this subsection—

"(A) no notice of any deficiency with respect to the tax imposed by section 4986 may be mailed under section 6212, and

"(B) no proceeding in any court for the refund of the tax imposed by section 4986 may be begun,

before the last day of the first February after the calendar year in which such oil was removed from the premises.

"(b) DEPOSITARY REQUIREMENTS.—

"(1) INTEGRATED OIL COMPANIES.—In the case of an integrated oil company, deposit of the estimated amount of—

"(A) withholding under subsection (a) by such company, and

"(B) such company's liability for the tax imposed by section 4986 with respect to oil for which withholding is not required,

shall be made twice a month.

"(2) PERSONS WHO ARE NOT INTEGRATED OIL COMPANIES.—In the case of a person, other than an integrated oil company—

"(A) DEPOSITS OF WITHHELD AMOUNTS.—Deposit of the amounts required to be withheld under subsection (a) shall be made not later than—

"(i) except as provided in clause (ii), 45 days after the close of the month in which the oil was removed, or

"(ii) in the case of oil purchased under a contract therefor by an independent refiner under which no payment is required to be made before the 46th day after the close of the month in which the oil is purchased, before the first day of the 3rd month which begins after the close of the month in which such oil was removed.

"(B) ESTIMATED SECTION 4986 TAX.—Deposits of the estimated amount of such person's liability for the tax imposed by section 4986 with respect to oil for which withholding is not required shall be made not later than 45 days after the close of the month in which the oil was removed from the premises.

"(3) INTEGRATED OIL COMPANY DEFINED.—For purposes of this subsection, the term 'integrated oil company' means a taxpayer described in paragraph (2) or (4) of section 613A(d) who is not an independent refiner.

"(4) INDEPENDENT REFINER.—For purposes of this subsection, the term 'independent refiner' has the same meaning as in paragraph (3) of section 3 of the Emergency Petroleum Allocation Act of 1973 (as in effect on January 1, 1980), except that 'the preceding calendar quarter's shall be substituted for 'November 27, 1973' in applying such paragraph for purposes of this paragraph.

"(c) CROSS REFERENCE.—

"For provision authorizing the Secretary to establish by regulations the mode and time for collecting the tax imposed by section 4986 (to the extent not otherwise provided in this chapter), see section 6302(a).

**"SEC. 4996. OTHER DEFINITIONS AND SPECIAL RULES.**

"(a) PRODUCER AND OPERATOR.—For purposes of this chapter—

"(1) PRODUCER.—

"(A) IN GENERAL.—Except as provided in subparagraph (B), the term 'producer' means the holder of the economic interest with respect to the crude oil.

"(B) PARTNERSHIPS.—

"(i) IN GENERAL.—If (but for this subparagraph) a partnership would be treated as the producer of any crude oil—

"(I) such crude oil shall be allocated among the partners of such partnership, and

"(II) any partner to whom such crude oil is allocated (and not the partnership) shall be treated as the producer of such crude oil.

"(ii) ALLOCATION.—Except to the extent otherwise provided in regulations, any allocation under clause (i)(I) shall be determined on the basis of a person's proportionate share of the income of the partnership.

"(2) OPERATOR.—

"(A) IN GENERAL.—Except as provided in subparagraph (b), the term 'operator' means the person primarily responsible for the management and operation of crude oil production on a property.

"(B) DESIGNATION OF OTHER PERSON.—Under regulations prescribed by the Secretary, the term 'operator' means the person (or persons) designated with respect to a property (or portion thereof) as the operator for purposes of this chapter by persons holding operating mineral interests in the property.

"(b) OTHER DEFINITIONS.—For purposes of this chapter—

"(1) CRUDE OIL.—The term 'crude oil' has the meaning given to such term by the June 1979 energy regulations.

"(2) BARREL.—The term 'barrel' means 42 United States gallons.

"(3) DOMESTIC.—The term 'domestic', when used with respect to crude oil, means crude oil produced from an oil well located in the United States or in a possession of the United States.

"(4) UNITED STATES.—The term 'United States' has the meaning given to such term by paragraph (1) of section 638 (relating to Continental Shelf areas).

"(5) POSSESSION OF THE UNITED STATES.—The term 'possession of the United States' has the meaning given to such term by paragraph (2) of section 638.

"(6) INDIAN TRIBE.—The term 'Indian tribe' has the meaning given to such term by section 106(b)(2)(C)(ii) of the Natural Gas Policy Act of 1978 (15 U.S.C. 3316(b)(2)(C)(ii)).

"(7) TAXABLE PERIOD.—The term 'taxable period' means—

"(A) March 1980, and

"(B) each calendar quarter beginning after March 1980.

"(8) ENERGY REGULATIONS.—

"(A) IN GENERAL.—The term 'energy regulations' means regulations prescribed under section 4(a) of the Emergency Petroleum Allocation Act of 1973 (15 U.S.C. 753(a)).

"(B) MARCH 1979 ENERGY REGULATIONS.—The March 1979 energy regulations shall be the terms of the energy regulations as such terms existed on March 1, 1979.

"(C) JUNE 1979 ENERGY REGULATIONS.—The June 1979 energy regulations—

"(i) shall be the terms of the energy regulations as such terms existed on June 1, 1979, and

"(ii) shall be treated as including final action taken pursuant thereto before June 1, 1979, and as including action taken before, on, or after such date with respect to incremental production from qualified tertiary enhanced recovery projects.

"(D) CONTINUED APPLICATION OF REGULATIONS AFTER DECONTROL.—Energy regulations shall be treated as continuing in effect without regard to decontrol of oil prices or any other termination of the application of such regulations.

"(c) SEVERANCE TAX ADJUSTMENT.—For purposes of this chapter—

"(1) IN GENERAL.—The severance tax adjustment with respect to any barrel of crude oil shall be the amount by which

"(A) any severance tax imposed with respect to such barrel, exceeds

"(B) the severance tax which would have been imposed if the barrel had been valued at its adjusted base price.

"(2) SEVERANCE TAX DEFINED. For purposes of this subsection, the term 'severance tax' means a tax—

"(A) imposed by a State with respect to the extraction of oil, and

"(B) determined on the basis of the gross value of the extracted oil.

"(3) LIMITATIONS.—

"(A) 15 PERCENT LIMITATION.—A severance tax shall not be taken into account to the extent that the rate thereof exceeds 15 percent.

"(B) INCREASES AFTER MARCH 31, 1979, MUST APPLY EQUALLY.—The amount of the severance tax taken into

account under paragraph (1) shall not exceed the amount which would have been imposed under a State severance tax in effect on March 31, 1979, unless such excess is attributable to an increase in the rate of the severance tax (or to the imposition of a severance tax) which applies equally to all portions of the gross value of each barrel of oil subject to such tax.

"(d) ALASKAN OIL FROM SADLEROCHIT RESERVOIR.—For purposes of this chapter—

"(1) IN GENERAL.—In the case of Sadlerochit oil—

"(A) ADJUSTED BASE PRICE INCREASED BY TAPS ADJUSTMENT.—The adjusted base price for any calendar quarter (determined without regard to this subsection) shall be increased by the TAPS adjustment (if any) for such quarter provided by paragraph (2).

"(B) REMOVAL PRICE DETERMINED ON MONTHLY BASIS.—The removal price of such oil removed during any calendar month shall be the average of the producer's removal prices for such month.

"(2) TAPS ADJUSTMENT.—

"(A) IN GENERAL.—The TAPS adjustment for any calendar quarter is the excess (if any) of

"(i) $6.26 over

"(ii) the TAPS tariff for the preceding calendar quarter.

"(B) TAPS TARIFF.—For purposes of subparagraph (A), the TAPS tariff for the preceding calendar quarter is the average per barrel amount paid for all transportation (ending in such quarter) of crude oil through the TAPS.

"(C) TAPS DEFINED.—For purposes of this paragraph, the term 'TAPS' means the Trans-Alaska Pipeline System.

"(3) SADLEROCHIT OIL DEFINED.—The term 'Sadlerochit oil' means crude oil produced from the Sadlerochit reservoir in the Prudhoe Bay oilfield.

"(e) SPECIAL RULES FOR POST-1978 TRANSFERS OF PROPERTY.—In the case of a transfer after 1978 of any portion of a property, for purposes of this chapter (including the application of the June 1979 energy regulations for purposes

of this chapter), after such transfer crude oil produced from any portion of such property shall not constitute oil from a stripper well property, newly discovered oil, or heavy oil, if such oil would not be so classified if the property had not been transferred.

"(f) ADJUSTMENT OF REMOVAL PRICE.—In determining the removal price of oil from a property in the case of any transaction, the Secretary may adjust the removal price to reflect clearly the fair market value of oil removed.

"(g) NO EXEMPTIONS FROM TAX.—No taxable crude oil, and no producer of such crude oil, shall be exempt from the tax imposed by this chapter except to the extent provided in this chapter or in any provision of law enacted after the date of the enactment of this chapter which grants a specific exemption, by reference to this chapter, from the tax imposed by this chapter.

"(h) CROSS REFERENCE.—

"For the holder of the economic interests in the case of a production payment, see section 636.

## "SEC. 4997. RECORDS AND INFORMATION; REGULATIONS.

"(a) RECORDS AND INFORMATION.—Each taxpayer liable for tax under section 4986, each partnership, trust, or estate producing domestic crude oil, each purchaser of domestic crude oil, and each operator of a well from which domestic crude oil was produced, shall keep such records, make such returns, and furnish such information (to the Secretary and to other persons having an interest in the oil) with respect to such oil as the Secretary may by regulations prescribe.

"(b) REGULATIONS.—The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of this chapter, including such changes in the application of the energy regulations for purposes of this chapter as may be necessary or appropriate to carry out such purposes.

"SEC. 4998. CROSS REFERENCES.

"(1) For additions to the tax and additional amount for failure to file tax return or to pay tax, see section 6651.

"(2) For additions to the tax and additional amounts for failure to file certain information returns, registration statements, etc., see section 6652.

"(3) For additions to the tax and additional amounts for negligence and fraud, see section 6653.

"(4) For additions to the tax and additional amounts for failure to make deposit of taxes, see section 6656.

"(5) For additions to the tax and additional amounts for failure to collect and pay over tax, or attempt to evade or defeat tax, see section 6672.

"(6) For criminal penalties for attempt to evade or defeat tax, willful failure to collect or pay over tax, willful failure to file return, supply information, or pay tax, and for fraud and false statements, see sections 7201, 7202, 7203, and 7206.

"(7) For criminal penalties for failure to furnish certain information regarding windfall profit tax on domestic crude oil, see section 7241."

(2) CLERICAL AMENDMENT.—The table of chapters for subtitle D is amended by adding at the end thereof the following new item:

"CHAPTER 45. Windfall profit tax on domestic crude oil."

(b) DEDUCTIBILITY OF WINDFALL PROFIT TAX.—The first sentence of section 164(a) (relating to deduction for taxes) is amended by inserting after paragraph (4) the following new paragraph:

"(5) The windfall profit tax imposed by section 4986."

(c) TIME FOR FILING RETURN OF WINDFALL PROFIT TAX; DEPOSITARY REQUIREMENTS—

(1) TIME FOR FILING RETURN OF WINDFALL PROFIT TAX.—

(A) Part V of subchapter A of chapter 61 (relating to time for filing returns and other documents) is amended by adding at the end thereof the following new section:

**"SEC. 6076. TIME FOR FILING RETURN OF WINDFALL PROFIT TAX.**

"(a) GENERAL RULE.—Except in the case of a return required by regulations prescribed under section 4995(a)(5), each return—

"(1) of the tax imposed by section 4986 (relating to windfall profit tax) for any taxable period (within the meaning of section 4996(b)(7), or

(2) by a person required under section 4995(a) to withhold the windfall profit tax for any taxable period,

shall be filed not later than the last day of the second month following the close of the taxable period.

"(b) CROSS REFERENCE.—

"For depositary requirements applicable to the tax imposed by section 4986, see section 4995(b)."

(B) The table of sections for such part V is amended by adding at the end thereof the following new item:

"Sec. 6076. Time for filing return of windfall profit tax."

(2) CROSS REFERENCE.—Subsection (d) of section 6302 is amended to read as follows:

"(d) CROSS REFERENCES.—

"(1) For treatment of earned income advance amounts as payment of withholding and FICA taxes, see section 3507(d).

"(2) For depositary requirements applicable to the windfall profit tax imposed by section 4986, see section 4995(b)."

(3) TECHNICAL AMENDMENT.—Section 7512 (relating to separate accounting for certain collected taxes, etc.) is amended—

(A) by striking out "or by chapter 33" in subsection (a) and (b) and inserting in lieu thereof ", by chapter 33, or by section 4986", and

(B) by striking out "or chapter 33" in subsections (b) and (c) and inserting in lieu thereof ", chapter 33, or section 4986".

(d) CERTAIN INFORMATION REQUIRED TO BE FURNISHED.—

(1) GENERAL RULE.—Subpart B of part III of subchapter A of chapter 61 (relating to information concern-

ing transactions with other persons) is amended by adding at the end thereof the following new section:

**"SEC. 6060C. INFORMATION REGARDING WINDFALL PROFIT TAX ON DOMESTIC CRUDE OIL.**

"(a) CERTIFICATION FURNISHED BY OPERATOR.—Under regulations prescribed by the Secretary, the operator of a property from which domestic crude oil was produced shall certify (at such time and in such manner as the Secretary shall by regulations prescribe) to the purchaser—

"(1) the adjusted base price (within the meaning of section 4989) with respect to such crude oil,

"(2) the tier and category of such crude oil for purposes of the tax imposed by section 4986,

"(3) if any certification is furnished to the operator by the producer with respect to whether such oil is exempt oil or independent producer oil, a copy of such certification,

"(4) the amount of such crude oil, and

"(5) such other information as the Secretary by regulations may require.

"(B) AGREEMENT BETWEEN OPERATOR AND PURCHASER.—The Secretary may by regulations provide that, if the operator and purchaser agree thereto, the operator shall be relieved of the duty of furnishing some or all of the information required under subsection (a).

"(c) SPECIAL RULE FOR OIL NOT SUBJECT TO WITHHOLDING.—If the tax imposed by section 4986 with respect to any oil for which witholding is not required under section 4995(a)—

"(1) subsections (a) and (b) shall be applied by substituting 'producer' for 'purchaser', and

"(2) paragraph (3) of subsection (a) shall not apply.

"(d) CROSS REFERENCES.—

"(1) For additions to tax for failure to furnish information required under this section, see section 6652(b).

"(2) For penalty for willful failure to supply information required under this section, see section 7241."

"(2) FOR PENALTY FOR WILLFUL FAILURE TO SUPPLY INFORMATION REQUIRED UNDER THIS SECTION, SEE SECTION 7241."

(2) TECHNICAL AND CONFORMING AMENDMENTS.—

(A) Section 6652(b) is amended—

(i) by striking out "or section 6050A" and inserting in lieu thereof the following: ", section 6050A", and

(ii) by inserting ", or section 6050C (relating to information regarding windfall profit tax on crude oil)" after "fishing boat operators)".

(B) The table of sections for subpart B of part III of subchapter A of chapter 61 is amended by adding at the end thereof the following new item:

"Sec. 6060C. Information regarding windfall profit tax on domestic crude oil."

(e) CRIMINAL PENALTY FOR FAILURE TO FURNISH CERTAIN INFORMATION.—

(1) IN GENERAL.—Part II of subchapter A of chapter 75 (relating to penalties applicable to certain taxes) is amended by adding at the end thereof the following new section:

**"SEC. 7241. WILLFUL FAILURE TO FURNISH CERTAIN INFORMATION REGARDING WINDFALL PROFIT TAX ON DOMESTIC CRUDE OIL.**

"Any person who is required under section 6050C (or regulations thereunder) to furnish any information or certification to any other person and who willfully fails to furnish such information or certification at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

(2) CLERICAL AMENDMENT.—The table of sections for such part II is amended by adding at the end thereof the following new item:

"Sec. 7241. Willful failure to furnish certain information regarding windfall profit tax on domestic crude oil."

(f) DEFICIENCY PROCEDURES.—

(1) The following provisions are each amended by striking out "or 44" each place it appears and inserting in lieu thereof "44, or 45":

(A) section 6211(a),

(B) section 6211(b)(2),

(C) section 6212(a),

(D) section 6213(a),

(E) section 6213(f),

(F) section 6214(c),

(G) section 6214(d),

(H) section 6161(b)(1)

(I) section 6344(a)(1), and

(J) section 7422(e).

(2) Subsection (a) of section 6211 is amended by striking out "and 44" and inserting in lieu thereof "44, and 45".

(3) Subsection (b) of section 6211 is amended by adding at the end thereof the following new paragraphs:

"(5) The amount withheld under section 4995(a) from amounts payable to any producer for crude oil removed during any taxable period (as defined in section 4996(b)(7)) which is not otherwise shown on a return by such producer shall be treated as tax shown by the producer on a return for the taxable period.

"(6) Any liability to pay amounts required to be withheld under section 4995(a) shall not be treated as a tax imposed by chapter 45.

(4) Paragraph (1) of section 6212(b) is amended—

(A) by striking out "or chapter 44" and inserting in lieu thereof "chapter 44, or chapter 45.",

(B) by striking out "chapter 44, and this chapter" and inserting in lieu thereof "chapter 44, chapter 45, and this chapter", and

(C) by striking out "TAXES IMPOSED BY CHAPTER 42" in the paragraph heading and inserting in lieu thereof "CERTAIN EXCISE TAXES".

(5) Paragraph (1) of section 6212(c) is amended—

(A) by striking out "or chapter 42 tax" and inserting in lieu thereof "of chapter 42 tax", and

(B) by inserting ", or of chapter 45 tax for the same taxable period" after "to which such petition relates".

(6)(A) Subsection (a) of section 6512 is amended—

(i) by striking out "chapter 41, 42, 43, 44 taxes" and inserting in lieu thereof "certain excise taxes",

(ii) by striking out "or of tax imposed by chapter 41" and inserting in lieu thereof "of tax imposed by chapter 41," and

(iii) by inserting ", or of tax imposed by chapter 45 for the same taxable period" after "to which such petition relates".

(B) Paragraph (1) of section 6512(b) is amended—

(i) by striking out "or of tax imposed by chapter 41" and inserting in lieu thereof "of tax imposed by chapter 41", and

(ii) by inserting ", or of tax imposed by chapter 45 for the same taxable period" after "to which such petition relates".

(7) The subsection heading for subsection (c) of section 6601 is amended by striking out "CHAPTER 41, 42, 43, or 44 TAX" and inserting in lieu thereof "CERTAIN EXCISE TAX".

(8) Subsection (a) of section 6653 is amended—

(A) by striking out "or by chapter 12" and inserting in lieu thereof ", by chapter 12",

(B) by striking out "is due" and inserting in lieu thereof ", or by chapter 45 (relating to windfall profit tax) is due", and

(C) by striking out "OR GIFT" in the subsection heading and inserting in lieu thereof ", GIFT, OR WINDFALL PROFIT".

(9) Subsection (a) of section 6862 is amended by striking out "certain excise taxes" and inserting in lieu thereof "the excise taxes imposed by chapters 41, 42, 43, 44, and 45."

(g) SPECIAL RULES FOR STATUTE OF LIMITATIONS.—

(1) ASSESSMENT.—Section 6501 (relating to limitations on assessment and collection) is amended by adding at the end thereof the following new subsection:

"(q) SPECIAL RULES FOR WINDFALL PROFIT TAX.—

"(1) OIL SUBJECT TO WITHHOLDING.—

"(A) IN GENERAL.—In the case of any oil to which section 4995(a) applies and with respect to which no return is required, the return referred to in this section shall be the return (of the person liable for the tax imposed by section 4986) of the taxes imposed by subtitle A for the taxable year in which the removal year ends.

"(B) REMOVAL YEAR.—For purposes of subparagraph (A), the term 'removal year' means the calendar year in which the oil is removed from the premises.

"(2) EXTENSION OF LIABILITY ATTRIBUTABLE TO DOE RECLASSIFICATION.—

"(A) IN GENERAL.—In the case of the tax imposed by chapter 45, if a Department of Energy change becomes final, the period for assessing any deficiency attributable to such change shall not expire before the date which is 1 year after the date on which such change becomes final.

"(B) DEPARTMENT OF ENERGY CHANGE.—For purposes of subparagraph (A) and section 6511(h)(2), the term 'Department of Energy change' means any change by the Department of Energy in the classification under the June 1979 energy regulations (as defined in section 4996(b)(8)(C)) of a property or of domestic crude oil from a property.

"(3) PARTNERSHIP ITEMS OF FEDERALLY REGISTERED PARTNERSHIPS.—Under regulations prescribed by the Secretary, rules similar to the rules of subsection (o) shall apply to the tax imposed by section 4986."

(2) REFUND.—Section 6511 (relating to limitations on credit or refund) is amended by redesignating subsection (h) as (i) and by inserting after subsection (g) the following new subsection:

"(h) SPECIAL RULES FOR WINDFALL PROFIT TAXES.—

"(1) OIL SUBJECT TO WITHHOLDING.—In the case of any oil to which section 4995(a) applies and with respect to which no return is required, the return referred to in subsection (a) shall be the return (of the person liable for the tax imposed by section 4986) of the taxes imposed by subtitle A for the taxable year in which the removal year (as defined in section 6501(q)(1)(B)) ends.

"(2) SPECIAL RULE FOR DOE RECLASSIFICATION.—In the case of any tax imposed by chapter 45, if a Department of Energy change (as defined in section 6501 (q)(2)(B)) becomes final, the period for filing a claim for credit or refund for any overpayment attributable to such change shall not expire before the date which is 1 year after the date on which such change becomes final.

"(3) PARTNERSHIP ITEMS OF FEDERALLY REGISTERED PARTNERSHIPS.—Under regulations prescribed by the Secretary, rules similar to the rules of subsection (g) shall apply to the tax imposed by section 4986."

(h) INTEREST ON OVERPAYMENTS.—Section 6611 (relating to interest on overpayment) is amended by redesignating subsection (h) as subsection (i) and by inserting after subsection (g) the following new subsection:

"(h) SPECIAL RULE FOR WINDFALL PROFIT TAX.—

"(1) IN GENERAL.—If any overpayment of tax imposed by section 4986 is refunded within 45 days after—

"(A) the last date (determined without regard to any extension of time for filing the return) prescribed for filing the return of the tax imposed by section 4986 for the taxable period with respect to which the overpayment was made, or

(B) if such return is filed after such last date, the date on which the return is filed,

no interest shall be allowed under subsection (a) on such overpayment.

"(2) SPECIAL RULE WHERE NO RETURN IS REQUIRED.—In the case of any oil for which no return of the tax imposed by section 4986 is required, the return referred to in paragraph (1) shall be the return of the tax imposed by subtitle A for the taxable year of the producer in

which the removal year (with respect to which the overpayment was made) ends. For purposes of the preceding sentence, the term 'removal year' means the calendar year in which the oil is removed from the premises."

(i) EFFECTIVE DATE.—

(1) IN GENERAL.—The amendments made by this section shall apply to periods after February 29, 1980.

(2) TRANSITIONAL RULES.—For the period ending June 30, 1980, the Secretary of the Treasury or his delegate shall prescribe rules relating to the administration of chapter 45 of the Internal Revenue Code of 1954. To the extent provided in such rules, such rules shall supplement or supplant for such period the administrative provisions contained in chapter 45 of such Code (or in so much of subtitle F of such Code as relates to such chapter 45).

## SEC. 102. ALLOCATION OF NET REVENUES FROM WINDFALL PROFIT TAX TO CERTAIN USES.

(a) SEPARATE ACCOUNT IN TREASURY ESTABLISHED.—The net revenues from the windfall profit tax for each fiscal year beginning after September 30, 1980, and before October 1, 1990, are hereby allocated for accounting purposes to a separate account in the Treasury to be known as the Windfall Profit Tax Account (hereinafter in this section referred to as the "Account").

(b) SPECIFIED USES FOR AMOUNTS IN THE ACCOUNT.—

(1) BASIC NET REVENUES.—In the case of the amount of basic net revenues allocated to the Account for any fiscal year, there shall be a further allocation to subaccounts for the following uses:

| Use for | Percent |
|---|---|
| Income tax reductions | 60 |
| Low-income assistance | 25 |
| Energy and transportation programs | 15 |

(2) ADDITIONAL NET REVENUES.—In the case of the amount of additional net revenues allocated to the Account for any fiscal year, there shall be a further allocation to subaccounts for the following uses:

| Use for | Percent |
|---|---|
| Income tax reductions | 66⅔ |
| Low-income assistance | 33⅓ |

(3) SPECIAL RULE FOR LOW-INCOME ASSISTANCE FOR 1982 AND SUBSEQUENT YEARS.—In the case of any amount allocated under paragraph (1) to the subaccount for low-income assistance for the fiscal year beginning October 1, 1981, or any subsequent fiscal year—

(A) 50 percent shall be allocated to a program to assist AFDC and SSI recipients under the Social Security Act, and

(B) 50 percent shall be allocated to a program of emergency energy assistance.

(c) NET REVENUES DEFINED.—For purposes of this section—

(1) IN GENERAL.—The term "net revenues of the windfall profit tax" means, for any fiscal year, the amount which the Secretary estimates to be the excess of—

(A) the gross revenues from the tax imposed by section 4986 for the fiscal year, over

(B) the sum of—

(i) the refunds of and other adjustments to such tax for such fiscal year, plus

(ii) the decrease in the income taxes impoed by chapter 1 resulting from the tax impsoed by section 4986.

For purposes of subparagraph (A), there shall not be taken into account any revenue attributable to an economic interest in crude oil held by the United States.

(2) BASIC NET REVENUES.—The term "basic net revenues" means the estimated net revenues which would result for any period under the assumptions for such period which were made in enacting the Crude Oil Windfall Profit Tax At of 1980.

(3) ADDITIONAL NET REVENUES.—The term "additional net revenues" means for any period the net revenues in excess of the basic net revenues for such period.

(d) PRESIDENT TO PROPOSE ALLOCATION OF NET REVENUES.—

(1) IN GENERAL.—The President shall propose for each fiscal year to which this section applies an allocation of the net revenues among the uses set forth in subsection (b).

(2) TIME AND MANNER FOR PROPOSING.—Except for the fiscal year beginning October 1, 1980, the proposal for each fiscal year shall be contained in the annual budget for such fiscal year. The proposal for the fiscal year beginning October 1, 1980, shall be submitted by the President within 90 days after the date of the enactment of this Act.

(e) REPORTS.—The Secretary of the Treasury shall report to the Congress not later than January 1 of 1982 and of each calendar year thereafter before 1992—

(1) the net revenues derived from the windfall profit tax for the fiscal year ending on September 30 of the preceding year, and

(2) the actual disposition for such fiscal year of such revenues among the uses specified in subsetion (b).

## SEC. 103. STUDY OF EFFECTS OF DECONTROL OF OIL PRICES AND OF WINDFALL PROFIT TAX.

(a) GENERAL RULE.—The President shall, not later than January 1, 1983, submit to the Congress a report on the effect of decontrol of oil prices and the windfall profitt tax on—

(1) domestic oil production,

(2) foreign oil imports,

(3) profits of the oil industry,

(4) inflation,

(5) employment,

(6) economic growth,

(7) Federal revenues, and

(8) national security.

(b) REPORT TO INCLUDE RECOMMENDATIONS.—The report required under subsection (a) shall include such legislation recommendations as the President determines to be advisable.

Internal Revenue Code of 1954 (26 U.S.C.):

**SEC. 7852. OTHER APPLICABLE RULES.**

**(a)** *Separability Clause.*—If any provision of this title, or the application thereof to any person or circumstances, is held invalid, the remainder of the title, and the application of such provision to other persons or circumstances, shall not be affected thereby.

No. 82-1066

# In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, APPELLANT

*v.*

HARRY PTASYNSKI, ET AL.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING*

## JOINT APPENDIX

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APPEAL DOCKETED DECEMBER 22, 1982.
PROBABLE JURISDICTION NOTED FEBRUARY 22, 1983

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## RELEVANT DOCKET ENTRIES

### DISTRICT COURT ENTRIES
### (Ptasynski, et al.)

| | | |
|---|---|---|
| 10/14-80 | 1 | COMPLAINT |
| 12/11/80 | 11 | AMENDED COMPLAINT. |
| 12/22/80 | 12 | MOTION of the U.S. to dismiss complaint. |
| 5/4/81 | 24 | MOTION of the State of Texas for Leave to intervene. |
| | 25 | PETITION in intervention of the State of Texas. |
| 6/10/81 | 29 | MOTION by State of Louisiana to Intervene as pltf. |
| | 44 | SECOND AMENDED AND SUPPLEMENTAL COMPLAINT. |
| 7/2/81 | 46 | ORDER granting motions of States of Texas and Louisiana to intervene. Cys to counsel. |
| | 47 | ORDER granting motion to file a second amended and supplemental complaint and ordering same filed instanter. Cys to counsel. |
| 7/29/81 | 51 | COMPLAINT IN INTERVENTION of State of Louisiana (allowed filed as of order of 7-2-81). |
| | 54 | ORDER denying deft's motion to dismiss as to pltfs Partridge, Ptasynski, Avery, Johnson and Calvin Petroleum; granting deft's motion to dismiss as to all remaining defts, provided that such pltfs shall remain parties to the action as permissive intervenors; giving defts 30 days from date of this order to file answer. cc counsel. |
| 9/8/81 | 55 | ANSWER of deft USA to Texas's Petition in Intervention. |
| 10/5/81 | 56 | ANSWER of deft to pltfs Second Amended and Supplemental Complaint. |
| 02/16/82 | 60 | MOTION of State of Louisiana FOR SUMMARY JUDGMENT. |
| 02/17/82 | 64 | MOTION of pltfs Partridge,Ptasynski, Avery and Calvin Petroleum for Summary Judgment. |
| | 67 | AFFIDAVIT OF KYE TROUT, JR. |
| 02/18/82 | 68 | MOTION FOR SUMMARY JUDGMENT by the State of Texas. |
| 02/19/82 | 70 | deft's CROSS MOTION FOR SUMMARY JUDGMENT. |
| | 71 | AFFIDAVIT of Hoyle H. Hamilton. |
| | 72 | AFFIDAVIT of Lonnie C. Smith. |

06/10/82 84 ORDER consolidated C80-0302 and C82-0050. cc counsel.

11/04/82 89 MEMORANDUM OPINION.

90 JUDGMENT finding generally for the pltfs and against the deft and ordering that pltfs recover of and from deft the amount of windfall profit taxes paid by pltfs in March 1980 for C80-302 and from March through December 1980 in C82-050, in such sum as may be determined by pltfs and deft with interest as provided by law and further ordering that all proceedings in this matter be stayed until a higher court has had occasion to pass upon the correctness of the trial court's decision. cc counsel.

11/15/82 91 AMENDED JUDGMENT ordering that Memorandum Opinion and judgment are directed only to Title I of P.L. 96-223 found at 26: 4986 and 4998 inclusive; further ordering that summary judgment is entered in accordance with Memorandum Opinion and the Windfall Profit Tax on Domestic Crude Oil, 26:4986 to 4998 inclusive, Title I of the Crude Oil Windfall Profit Tax Act of 1980 is held unconstitutional; further ordering that pltfs recover from deft amt of windfall profit taxes paid by pltfs in March of 1980 for C80-302 and March thru December 1980 for C80-050, in such sum as alleged in the Second Supplemental and Amended Complaint with interest as provided by law; further ordering that all proceedings are stayed until a higher court has had occasion to pass upon the correctness of the trial court's decision, and further ordering that final judgment is entered accordingly. cc counsel.

11/18/82 92 NOTICE OF APPEAL to the Supreme Court of the United States from the Judgment and Amended Judgment filed in this Court 11/04/82 and 11/15/82. Cy of notice of Clerk, Supreme Court of the United States and counsel.

## DISTRICT COURT DOCKET ENTRIES
## (Partridge)

02/23/82 1 COMPLAINT.

05/13/82 5 ANSWER of U.S.

06/10/82 6 ORDER consolidated cases C80-0302 and C82-0050. cc counsel.

11/04/82 7 MEMORANDUM OPINION.

8 JUDGMENT finding generally for the pltfs and against the defts and ordering pltfs recover from deft amt of windfall profit taxes paid by pltfs in March 1980 for C80-032 and from March through December 1980 in C82-050 in such sum as may be determined by pltfs and deft with interest as provided by law; further ordering that all proceedings in this matter are stayed until a higher court has had occasion to pass upon the correctness of the trial court's decision. cc counsel.

11/15/82 9 AMENDED JUDGMENT ordering that Memorandum Opinion and judgment are directed only to Title I of P.L. 96-223 found at 26:4986 to 4998 inclusive; further ordering that summary judgment is entered in accordance with Memorandum Opinion and the Windfall Profit Tax on Domestic Crude Oil, 26:4986 to 4998 inclusive, Title I of the Crude Oil Windfall Profit Tax Act of 1980 is held unconstitutional; further ordering that pltfs recover from deft amt of windfall profit taxes paid by pltfs in March of 1980 for C80-302 and March thru December, 1980 for C80-050, in such sum as alleged in the Second Supplemental and Amended Complaint with interest as provided by law; further ordering that all proceedings are stayed until a higher court has had occasion to pass upon the correctness of the trial court's decision, and further ordering that final judgment is entered accordingly. cc counsel.

11/18/82 10 NOTICE OF APPEAL to the Supreme Court of the United States from the Judgment and Amended Judgments filed in this Court 11-04-82 and 11-15-82. Cy of notice to Clerk, Supreme Court of the United States and counsel.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

No. C80-0302K

INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA,
ET AL., PLAINTIFF

*v.*

UNITED STATES OF AMERICA, DEFENDANT

**PETITION IN INTERVENTION OF
THE STATE OF TEXAS**

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES the intervening Plaintiff State of Texas (Texas), by and through its Attorney General Mark White, and files this petition for declaratory and injunctive relief against the United States of America.

In support of its motion the State of Texas would show the following:

**NATURE OF THE ACTION**

1. This action challenges the constitutionality of the Crude Oil Windfall Profit Tax Act of 1980 (Windfall Profit Tax) (P.L. 96-223). It is an action for a judgment (a) to declare that the Windfall Profit Tax unconstitutionally imposes a geographically non-uniform excise tax on domestic crude oil contrary to the uniformity clause of Article I, Section 8, Clause (1) of the United States Constitution; (b) to declare that the sovereign interest of Texas in continuing to provide for the broad class of essential individual conservation expectations held by citizens involved in the production of hydrocarbon resources is impeded; and (c) to enjoin the Defendant from enforcing the Windfall Profit Tax.

**JURISDICTION AND VENUE**

2. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1331(a), as amended, P.L. 94-574. Jurisdiction is founded on the existence of a federal question and pursuant to the amendments, P.L. 94-574, the amount in controversy is irrelevant since this action is brought against the United States.

3. The jurisdiction of this Court is also invoked under 28 U.S.C.A. § 1251(b)(2). Jurisdiction is founded upon the appropriateness of Texas' participation in this Court of concurrent jurisdiction rather than upon the non-exclusive original jurisdiction of the Supreme Court.

4. The anti-injunction provisions of 26 U.S.C.A. § 7421 do not apply to Texas as Plaintiff-Intervenor in the present case because Texas is not a "person" within the purview of said Act, and for the further reason that the petition filed by Texas is not intended for the purpose of enjoining or restraining the assessment or collection of the tax but rather for the adjudication of the Windfall Profit Tax's constitutionality.

5. Venue is proper in this District under 28 U.S.C.A. § 1391(e).

## THE PARTIES

6. The intervening Plaintiff State of Texas is a sovereign state, having entered the Union on December 29, 1845. Lands within Texas, exclusive of state-owned lands and certain other lands, are subject to the limited geographical scope of the Windfall Profit Tax. The duties of the State of Texas to provide various essential hydrocarbon resource conservation services to the citizens of Texas are codified in Title 3 of the Texas Natural Resources Code Annotated (1978), Sections 85.000 to 103.046. Not the least of these hydrocarbon resource conservation services are the maximumization of recovery of oil and gas in place, the protection of correlative rights, and the prevention of physical waste; all of which are realized by the preferences historically given stripper well production relative to the large potential production wells by the State of Texas.

7 Defendant is the United States of America.

## LEGISLATIVE BACKGROUND

8. The Windfall Profit Tax (P.L. 96-223) imposes an excise tax on most domestic crude oil produced after February 29, 1980. This tax is imposed upon the holders of economic interests in the oil and is collected by the first purchaser of the oil. The Windfall Profit Tax provides for five categories of exemptions including one based upon the geographic location of the well from which the oil is produced.

9. The geographic exemption is found in Section 101(a)(1) of the Windfall Profit Tax [26 U.S.C.A. § 4994(e)].

10. Section 101(a)(1) exempts Alaskan oil which is defined as any crude oil, except oil produced from the Sadlerochit Reservoir, which is produced:

(1) from a reservoir from which oil has been produced in commercial quantities through a well located north of the Arctic Circle, or

(2) from a well located on the northerly side of the divide of the Alaska-Aleutian Range and at least 75 miles from the nearest point on the Trans-Alaska Pipeline System.

11. The legislative purpose of the Windfall Profit Tax was to reduce dependence of the United States upon imported oil and to encourage domestic production of oil. No conservation purpose was contemplated or articulated and none is served.

12. Neither the Windfall Profit Tax nor its legislative history purport to provide adequate subsitutes for the protection of essential individual conservation rights provided by Texas, to bear the increased costs of deprivation of these essential service, or to vindicate other essential or fundamental rights under the Fourteenth Amendment.

## FACTUAL BACKGROUND

13. Neither Texas nor any other state except Alaska has any lands north of the Arctic Circle or north of the Alaska-Aleutian Range divide.

14. Texas has long responded to its individual citizens' expectations for essential hydrocarbon resource conservation service. Title 3, Texas Natural Resources Code Annotated (1978), Sections 85.001 to 103.046 codifies Texas' duties to provide for the protection and vindication of individual conservation rights. Enforcement of conservation statutes is properly a state function and has historically been discharged as such.

15. The Windfall Profit Tax is an excise tax on oil production which will increase the cost of production from stripper oil wells and cause their premature abandonment.

16. Texas has consistently encouraged stripper or marginal well production relative to large potential well production in order to protect correlative rights, to prevent

physical waste, and to guarantee the maximum recovery of oil in place. This encouragement is necessary since stripper production is near to the point of well abandonment.

## FIRST CLAIM FOR RELIEF

17. The Windfall Profit Tax is unconstitutional because it is an excise tax applied in a geographically non-uniform manner. Article I, Section 8, Clause (1) of the United States Constitution guarantees to the states as separate sovereigns that excise taxes will be uniform in geographic application so that one part of the Union may not be gratified at the expense of another.

18. The attempt in the legislative history to justify the non-uniform provisions of the Windfall Profit Tax is contrary to the history, spirit, and the letter of the uniformity clause. Non-uniform taxes are prima facie suspect under the uniformity clause and cannot be justified by the mere reasonableness of the exception under consideration.

19. A substantial question of constitutional significance relating to the ability of a government of enumerated powers to act beyond the clearly defined scope of those enumerated powers is therefore presented.

## SECOND CLAIM FOR RELIEF

20. The Windfall Profit Tax necessarily deprives individuals of the benefit of the provision of essential hydrocarbon resource conservation services by the State of Texas.

21. Both Congress and the courts have recognized the essential nature of these individual conservation benefits and have properly left provision for these rights to the states. The Tenth Amendment guarantees to the states that they have retained the powers not expressly delegated to the federal government. Both historically established popular understanding as well as constitutional allocation of government function define those powers which are reserved to the states. Congress through the Windfall Profit Tax has unreasonably impeded Texas' ability to carry out conservation responsibilities and as a result has exercised nondelegated powers and violated the Tenth Amendment's reservation to the states. This congressional interference is prima facie improper since Congress has neither met its burden of providing an adequate substitute conservation service, compensated individuals for the physical waste and

loss of economically recoverable minerals in place caused by premature production nor justified the Windfall Profit Tax as an exercise of congressional power under Section 5 of the Fourteenth Amendment to the United States Constitution.

22. Therefore, a substantial question of constitutional significance is presented relating directly to the proper division of power and sovereignty between the federal government and the states as a part of a federal system of government.

WHEREFORE, the State of Texas prays this Court to enter an order granting the following relief:

1. A declaration that the Crude Oil Windfall Profit Tax Act of 1980 is unconstitutional and void as an improper nonuniform excise tax.

2. A declaration that the Crude Oil Windfall Profit Tax Act of 1980 is unconstitutional and void as an improper exercise of nondelegated powers and a violation of the Tenth Amendment's reservation of powers to the states.

3. An injunction to prohibit the Defendant from collecting excise taxes under the Crude Oil Windfall Profit Tax Act of 1980.

Respectfully submitted,

/s/ Mark White

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UNITED STATES DISTRICT COURT
DISTRICT OF WYOMING

No. C80-0302K

INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, ET AL., PLAINTIFFS

*v.*

UNITED STATES OF AMERICA, DEFENDANT

**COMPLAINT IN INTERVENTION OF STATE OF LOUISIANA**

**JURISDICTION AND VENUE**

1. This is an action for both declaratory judgment and injunctive relief challenging Title I of the Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223 (codified in scattered sections of the Internal Revenue Code) ("the WPT" or "the Act"). Intervenor seeks a declaratory judgment that the Act is unconstitutional because it violates both the Uniformity Clause (Article 1, Section 8, Clause (1)) and the Tenth Amendment of the United States Constitution and an injunction enjoining the officer or officers of the United States charged with the duty of enforcing the Act from enforcing that Act.

2. This action arises under the Constitution and Internal Revenue laws of the United States. This Court has jurisdiction under 28 U.S.C. § 1331(a). Declaratory relief is authorized by 28 U.S.C. §§ 2201 and 2202. Injunctive relief is authorized by 28 U.S.C. § 1361.

3. Venue in this district is proper under 28 U.S.C. § 1391(e).

**THE PARTIES**

4. The association plaintiffs are organizations of independent domestic oil producers, explorer-producers of crude oil, and royalty owners of crude oil. The individual members of these organizations have paid and, in the future, will be required to pay the tax under the Act. Allegations concerning these plaintiffs are more fully set forth in paragraphs 4 and 5 of the plaintiffs' Amended Complaint,

and are incorporated by reference as if fully set forth herein.

5. The individual taxpayer plaintiffs, Harry Ptasynski, John Partridge, Arch W. Deuel, William Edward Wolff, Berton W. Avery, Goldie Avery, Frederick S. Johnson, and Calvin Petroleum Corp., are royalty owners or independent domestic oil producers. The first purchaser of domestic taxable crude oil from these individual taxpayer plaintiffs has withheld and deducted payment equal to the calculated or estimated amount of the tax as to each of the plaintiffs, and has, on information and belief, paid such funds into the United States Treasury. The individual taxpayer plaintiffs have filed claims for refund and received notices of disallowance of those claims as more fully set forth in paragraphs 6-13 of the plaintiffs' Amended Complaint, and the allegations in these paragraphs are incorporated by reference as if fully set forth herein.

6. Defendant is the United States of America. The Commissioner of the Internal Revenue Service is the officer of the United States charged with the enforcement of the WPT.

7. The intervenor-plaintiff is the State of Louisiana. Louisiana is the third ranking crude oil producing state (behind Alaska and Texas) in the United States. Approximately 10 percent of the proven oil reserves in the United States are contained in Louisiana.

## THE STATUTORY FRAMEWORK

8. Title I of the WPT imposes an excise tax on the holders of economic interests in most domestic crude oil produced in the United States after February 29, 1980. This tax is collected, in most cases, by the first purchaser of the oil. The Act provides for five categories of exemptions, including one based upon the geographic location of the well from which the oil is produced (i.e., "any exempt Alaskan oil"). Section 101(a)(1) of the Act, I.R.C. § 4991(b).

9. Section 101(a)(1) of the Act, I.R.C. § 4994(e) defines "exempt Alaskan oil" as

> any crude oil "other than Sadlerochit oil" which is produced

(1) from a reservoir from which oil has been produced in commercial quantities through a well located north of the Arctic Circle, or,

(2) from a well located on the northerly side of the divide of the Alaska-Aleutian Range and at least 75 miles from the nearest point on the Trans-Alaska Pipeline System.

**FIRST CLAIM FOR RELIEF**

10. The United States Constitution, Article I, Section 8, Clause (1) states that:

> The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

11 The State of Alaska is the only state in the United States with lands north of the Arctic Circle or north of the Alaska-Aleutian Range divide.

12. The Crude Oil Windfall Profit Tax is an excise tax. Section 101(a)(1) of the Act, I.R.C. § 4986(a). Because the tax in not levied uniformly throughout the United States, it violates Article I, Section 8, Clause (1), of the United States Constitution.

13. This lack of uniformity violates the sovereign interest of the State of Louisiana protected by Article I, Section 8, Clause (1) of the United States Constitution and imposes an unequal and discriminatory tax burden on the oil and the producers of oil located within the State of Louisiana.

14. The WPT states that the target amount of revenue to be generated by the Crude Oil Windfall Profit Tax is $227.3 billion and states that the tax will be phased out over a 33-month period following the collection of this target amount. I.R.C. § 4990. Because the tax burden is not evenly distributed, the oil produced within the State of Louisiana must bear a disproportionate share of this target amount.

**SECOND CLAIM FOR RELIEF**

15. The Tenth Amendment of the United States Constitution states that:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or the people.

16. The power to regulate the production and conservation of a state's energy resources is one not specifically delegated to the United States and is consequently reserved to the state.

17. The WPT creates economic disincentives for the production of crude oil and discourages that production within the areas subject to the tax. This has interfered, and will continue to interfere, with the state's ability to regulate and conserve energy production within the state and has diminished, and will in the future diminish state severance tax revenues.

18. The WPT interferes with the sovereign state function of regulating and conserving natural resource production within the State of Louisiana in voliation of the Tenth Amendment of the United States Constitution.

WHEREFORE, the State of Louisiana respectfully prays that this Court:

(a) adjudge and declare that Title I of the Crude Oil Windfall Profit Tax Act of 1980 violates the uniformity clause of the United States Constitution (Article I, Section 8, Clause (1)) and is therefore unconstitutional;

(b) adjudge and declare that Title I of the Crude Oil Windfall Profit Tax Act of 1980 violates the Tenth Amendment to the United States Constitution and is therefore unconstitutional;

(c) permanently enjoin and restrain the Commissioner of the Internal Revenue Service, the officer of the United States charged with enforcement of Title I of the Crude Oil Windfall Profit Tax Act of 1980, from enforcing, implementing, or taking any further action which results in the assessment and collection of the Windfall Profit Tax; and,

(d) provide such other relief as the Court may deem just and proper.

By their Attorneys:

/s/ George J. Domas
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*Attorneys for the State of Louisiana*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICTOF WYOMING

No. C80-0302

INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, AMERICAN ASSOCIATION OF PETROLEUM LANDMEN, ASSOCIATION OF OILWELL SERVICING CONTRACTORS, EASTERN KANSAS OIL AND GAS ASSOCIATION, LIAISON COMMITTEE OF COOPERATING OIL AND GAS ASSOCIATIONS, ARKOMA BASIN INDEPENDENT GAS PRODUCERS ASSOCIATION, CALIFORNIA INDEPENDENT PRODUCERS ASSOCIATION, ILLINOIS OIL AND GAS ASSOCIATION, INDIANA OIL AND GAS ASSOCIATION, INDEPENDENT OIL AND GAS ASSOCIATION OF WEST VIRGINIA, INDEPENDENT PETROLEUM ASSOCIATION OF MOUNTAIN STATES, KANSAS INDEPENDENT OIL AND GAS ASSOCIATION, LOUISIANA LANDOWNERS ASSOCIATION, INC., MICHIGAN OIL AND GAS ASSOCIATION, NEW YORK STATE OIL PRODUCERS ASSOCIATION, INDEPENDENT PETROLEUM ASSOCIATION OF NEW MEXICO, KENTUCKY OIL AND GAS ASSOCIATION, LOUISIANA ASSOCIATION OF INDEPENDENT PRODUCERS AND ROYALTY OWNERS, NATIONAL STRIPPER WELL ASSOCIATION NORTH TEXAS OIL AND GAS ASSOCIATION, OHIO OIL AND GAS ASSOCIATION, PANDHANDLE PRODUCERS AND ROYALTY OWNERS ASSOCIATION, PENNSYLVANIA OIL AND GAS ASSOCIATION, TENNESSEE OIL AND GAS ASSOCIATION, VIRGINIA OIL AND GAS ASSOCIATION, OKLAHOMA INDEPENDENT PETROLEUM ASSOCIATION, PENNSYLVANIA GRADE CRUDE OIL ASSOCIATION, PERMIAM BASIN PETROLEUM ASSOCIATION, TEXAS INDEPENDENT PRODUCERS AND ROYALTY OWNERS ASSOCIATION, WEST CENTRAL TEXAS OIL AND GAS ASSOCIATION, HARRY PTASYNSKI, JOHN PARTRIDGE, BERTON W. AVERY, GOLDIE AVERY, FREDERICK S. JOHNSON, AND CALVIN PETROLEUM CORPORATION, PLAINTIFFS,

*v.*

UNITED STATES OF AMERICA, DEFENDANT.

## SECOND AMENDED AND SUPPLEMENTAL COMPLAINT

COME NOW the plaintiffs and for their amended complaint against defendant respectfully allege and represent as follows:

### COUNT ONE

### I. Nature of the Action

1. This action arises under the Internal Revenue Laws of the United States of America. This action challenges the constitutionality of Title I of the Crude Oil Windfall Profit Tax Act of 1980 (the "Act") (Public Law 96-223 entitled "Windfall Profit Tax on Domestic Crude Oil"). Although called a tax on profits, the tax imposed by the Act is an excise tax on produced domestic taxable crude oil. Plaintiff Taxpayers seek to obtain a refund of the special excise taxes that have been illegally imposed on the domestic taxable crude oil of domestic oil producers and that have been illegally collected under the Act. The Association plaintiffs seek only to represent their members in helping to obtain an adjudication that Title I of the Act is unconstitutional.

### II. Jurisdiction

2. The jurisdiction of this Court is invoked under 28 U.S.C. § 1331(a) providing for original jurisdiction in the District Court of the United States over any suits arising under the Constitution and the laws of the United States of America. The jurisdiction of this Court is also invoked under the provisions of 28 U.S.C. § 1346(a)(1); the Federal Mandamus Statute (Public Law 87-749, 76 Stat. 744; 28 U.S.C. § 1361 *et. seq.*); Article I, Section 8, Clause 1 of the United States Constitution, and Amendment V of the United States Constitution.

### III. Venue

3. This action is properly brought in this judicial district under the venue provisions of 28 U.S.C. § 1391(e) and 28 U.S.C. § 1402(a).

### IV. Parties

4. Plaintiff, Independent Petroleum Association of America (IPAA) is a national organization of independent domestic oil producers. Members of the IPAA have had a special excise tax imposed on a portion of their domestic taxable crude oil under the Act, and those members have paid that special excise tax. The members of the IPAA also are consumers of petroleum products, some of which are prepared from domestic crude oil subject to the tax under the Act. IPAA is dedicated to representing the common interests of its members before governmental authorities and other entities concerned with oil and gas related issues.

5. Plaintiffs, American Association of Petroleum Landmen, Association of Oilwell Servicing Contractors, Eastern Kansas Oil and Gas Association, Liaison Committee of Cooperating Oil and Gas Association, Arkoma Basin Independent Gas Producers Association, California Independent Producers Association, Illinois Oil and Gas Association, Indiana Oil and Gas Association, Independent Oil and Gas Association of West Virginia, Independent Petroleum Association of Mountain States, Kansas Independent Oil and Gas Association, Louisiana Landowners Association, Inc., Michigan Oil and Gas Association, New York State Oil Producers Association, Independent Oil Producers Tri-State, Inc., Independent Petroleum Association of New Mexico, Kentucky Oil and Gas Association, Louisiana Association of Independent Producers and Royalty Owners, National Stripper Well Association, North Texas Oil and Gas Association, Ohio Oil and Gas Association, Panhandle Producers and Royalty Owners Association, Pennsylvania Oil and Gas Association, Tennessee Oil and Gas Association, Virginia Oil and Gas Association, Oklahoma Independent Petroleum Association, Pennsylvania Grade Crude Oil Associaton, Permian Basin Petroleum Association, Texas Independent Producers and Royalty Owners Association, and West Central Texas Oil and Gas Association are all national, state or regional associations of individuals and companies which are explorers-producers of crude oil or are royalty owners of crude oil. The individual members of these organizations

have paid and, in the future will be rquired to pay, the tax under the Act. These organizations, together with IPAA, represent essentially all of the some 12,000 independent explorers-producers of crude oil and natural gas and several thousand royalty owners in the United States. The combined membership of these organizations account for approximately 90% of the wildcat exploratory drilling in the United States and drill 80% of all wells in the United States and have discovered more than 50% of the known crude oil and natural gas reserves in the United States.

6. Plaintiff, Harry Ptasynski, is a citizen of the State of Wyoming. Plaintiff Ptasynski is an independent domestic oil producer and a member of IPAA. Plaintiff Ptasynski has had a special excise tax imposed on a portion of his domestic taxable crude oil under the Act. Each purchaser of production from this plaintiff has withheld from payments for domestic taxable crude oil the tax under the Act for all taxable periods since March 1, 1980. Plaintiff Ptasynski is a consumer of petroleum products, some of which are prepared from domestic crude oil subject to the tax under the Act. Plaintiff Ptasynski filed an appropriate claim for refund (From 843) with the District Director of the United States Internal Revenue Service Office at Cheyenne, Wyoming on or about October 17, 1980 in accordance with instructions by such Director to counsel for plaintiff. A copy of this claim for refund is attached hereto as Exhibit "A". This claim for refund was rejected and disallowed. A copy of the rejection is attached as Exhibit "B".

7. Plaintiff, John Partridge, is a citizen of the State of Wyoming. Plaintiff Partridge is an independent domestic oil producer and a member of IPAA. Plaintiff Partridge has had a special excise tax imposed on a portion of his domestic taxable crude oil under the Act. Each purchaser of production from this plaintiff has withheld from payments for crude oil the tax under the Act for all taxable periods since March 1, 1980. Plaintiff Partridge is a consumer of petroleum products, some of which are prepared for domestic crude oil subject to the tax under the Act. Plaintiff Partridge filed an appropriate claim for refund (Form 843) with the District Director of the United States Internal Revenue

Service Office at Cheyenne, Wyoming on or about October 29, 1980 in accordance with instructions by such director to counsel for plaintiff. A copy of this claim for refund is attached hereto as Exhibit "C". This claim for refund was rejected and disallowed on December 3, 1980. A copy of the rejection is attached as Exhibit "D".

8. Plaintiffs, Berton W. Avery and Goldie Avery, husband and wife, are citizens of the State of Wyoming. Plaintiffs Avery are royalty owners who have had taxes withheld from their royalty payments because the taxes have been imposed on domestic taxable crude oil and withheld from royalty payments for crude oil by purchasers of domestic taxable crude oil under the Act. Plaintiffs Avery are consumers of petroleum products, some of which are prepared from domestic crude oil subject to the tax under the Act. On or about October 17, 1980, Plaintiffs Avery filed a claim for refund (Form 843) with Michael J. Kelly, District Director of the United States Internal Revenue Service Office at Cheyenne, Wyoming. Prior to the filing of said claim for refund, Mr. Michael J. Kelly, District Director of the Internal Revenue Service at Cheyenne, Wyoming, represented to counsel for plaintiffs that each such claim for refund filed with his office would be processed through the Ogden, Utah office of the Internal Revenue Service and would be disallowed by said District Director within approximately three weeks after filing. A copy of this claim for refund is attached hereto as Exhibit "E". This claim for refund is pending and has not been acted upon in over eight months.

9. Plaintiff, Frederick S. Johnson, is a citizen of the State of Wyoming and a member of IPAA. Plaintiff Johnson is a royalty owner who has had taxes withheld from his royalty payments because the taxes have been imposed on domestic taxable crude oil and withheld from royalty payments for crude oil by purchasers of domestic taxable crude oil under the Act. Plaintiff Johnson is a consumer of petroleum products, some of which are prepared from domestic crude oil subject to the tax under the Act. Plaintiff Johnson filed an appropriate claim for refund (Form 843) with the Director of the United States Internal

Revenue Service Office at Cheyenne, Wyoming on or about October 17, 1981. The allegation concerning Michael J. Kelly's representation to counsel for plaintiffs in paragraph 8 above is incorporated herein by reference. A copy of this claim for refund is attached hereto as Exhibit "F". This claim for refund is pending and has not been acted upon in over eight months.

10. Plaintiff, Calvin Petroleum Corporation ("Calvin"), is both a royalty owner and an indpendent domestic oil producer. Plaintiff Calvin is a member of IPAA. Plaintiff Calvin is the holder of economic interests in domestic taxable crude oil which has been and is being produced in the State of Wyoming and other states. Plaintiff Calvin has had a special excise tax imposed under the Act on a portion of its domestic taxable crude oil. Each purchaser of production from this plaintiff has withheld from payments for domestic taxable crude oil the tax under the Act for all taxable periods since March 1, 1980. On August 26, 1980, Plaintiff Calvin filed an appropriate claim for refund (Form 843) with the Director of the United States Internal Revenue Service Office at Ogden, Utah. A copy of this claim for refund is attached hereto as Exhibit "G". This claim for refund is pending without action although filed over nine months ago.

11. In each of the instances alleged in paragraphs 6 through 10 above, the first purchaser of such domestic taxable crude oil, pursuant to the mandate of the Act, has deducted and withheld payment from the owners of said crude oil for that portion of said crude oil equal to the calculated or estimated amount of the tax for pyament over to the United States of America and, on information and belief, has paid into the Treasury of the United States of America all such sums withheld in accordance with the requirements of the Act, all without any consent or approval by any of the plaintiffs herein.

12. Defendant is the United States of America.

## V. Public Law 96-223

13. The Act (P.L. 96-223) imposes, effective March 1, 1980, a tax on all domestic taxable crude oil produced after

February 29, 1980. Although called a tax on profits, the tax is a temporary excise on produced domestic taxable crude oil, imposed when the crude oil is removed from the premises. The tax is imposed on the holder of the economic interest in the oil, called the "producer" under the Act. Primary collection responsibility, however, is on the first purchaser of the crude oil. Domestically producer crude oil is subject to this excise tax unless it is specifically exempted by the Act. The Act provides for five different categories of exemptions, which are determined either on the basis of ownership classification or the location of the wells from which the oil is produced.

14. Under § 101(a)(1) of the Act, the taxable period of March 1, 1980 to March 31, 1980, is designated as a separate and complete taxable period [26 U.S.C. § 4996(b)(7)(a)]. Each calendar quarter beginning after March 31, 1980, is a separate and complete taxable period under the Act.

### VI. The Act is Unconstitutional

15. One of the exemptions granted under the Act is on the basis of where the oil is located. The Act excludes certain Alaskan oil from the operation of the tax. [26 U.S.C. § 4991(b)(1)].

16. Section 101(a)(1) of the Act [26 U.S.C. § 4994(e)] defines exempt Alaskan oil as any crude oil (other than Sadlerochit oil) which is produced:

> "(1) from a reservoir from which oil has been produced in commercial quantities through a well located north of the Arctic Circle, or
>
> "(2) from a well located on the northly side of the divide of the Alaska-Aleutian Range and at least 75 miles from the nearest point on the Trans-Alaska Pipeline System."

17. The United States Constitution, Article I, Section 8, Clause 1 provides:

> "The Congress shall have power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; *but all* Duties, Imposts and

*Excises shall be uniform throughout the United States.*" (Emphasis Added.)

This Constitutional requirement means that excise taxes must be levied uniformly on a geographical basis.

18. Section 101(a)(1) of the Act [26 U.S.C. § 4986(a)] classifies the tax as an excise.

19. Because the tax is not levied uniformly throughout the United States, it violates Article I, Section 8, Clause 1 of the United States Constitution.

20. This lack of uniformity results in unwarranted discrimination against those persons upon whose domestic taxable crude oil the tax is levied.

21. Congress designed the tax to raise $227.3 billion in tax revenues over the period the tax is in effect. Because the tax burden is not evenly distributed, the plaintiffs herein and other non-exempt producers of domestic taxable crude oil must bear a disproportionate amount of the $227.3 billion tax burden created by the Act.

22. The legislative history of the Act demonstrates that the proper remedy for this unconstitutional situation is invalidation of the tax. Extension of the tax to those areas of Alaska not covered by the tax would significantly interfere with the announced goals of energy independence and increased petroleum availability.

23. As clearly appears from its legislative history, the Act was enacted for the stated purposes of reducing the dependence of the United States of America on foreign oil and encouraging domestic production of oil. In reality the Act will have the opposite effect and will increase the dependence of the United States of America on foreign oil and will actually decrease domestic production of oil.

24. Although the purpose of the Act as appears from its legislative history may be reasonable, its application and effect are wholly unreasonable and unlawful. The Act, therefore, violates the due process clause of Amendment V of the United States Constitution.

25. Because there is no rational relationship between said purposes of the Act and the actual application and effect of the Act, it violates the due process clause of Amendment V of the United States Constitution.

26. There is no rational basis for distinguishing between the domestic taxable crude oil subject to the tax and property other than such domestic taxable crude oil. The Act results in an unwarranted discrimination against those owners and producers of domestic taxable crude oil who are subject to the tax, including plaintiffs, and thus it violates the plaintiff's rights of due process.

27. The tax cannot be justified as an attempt to reclaim high prices caused by the actions of members of the Organization of Petroleum Exporting Countries (OPEC) because the tax only increases the power of OPEC by decreasing domestic production of crude oil. The means and effect of the Act are not reasonably related to the purposes for which it was enacted, namely, increasing the energy independence of the United States of America. Therefore, the Act violates plaintiffs' rights of due process of law guaranteed by Amendment V to the United States Constitution.

28. The tax imposed by the Act has resulted in the taking of the property of plaintiffs for public use without just compensation contrary to the United States Constitution, Amendment V, which prohibits the taking of private property for public use without just compensation.

29. The total number of persons and entities who are not exempt from imposition of the tax consists of approximately 12,000 producers and 2½ million royalty owners which number comprises approximately one percent of the population of the United States of America. The United States Constitution, Amendment V, guarantees the political protection of minorities from the tyranny of the majority. It prevents the arbitrary seizure of the property of minorities to serve the purposes of the majority.

30. The persons paying the tax under the Act are not compensated for the taking of their property either in a concrete form, or by sharing equally in the benefits of the tax. The burden of the tax falls heavily upon a small minority while the benefits of the tax are directed toward other segments of society (Section 102 of the Act).

31. The property of said minority is taken under the Act for the benefit of the majority, in total disregard of the po-

litical protections inherent in the concept of private property.

32. The discriminatory seizure of the private property of minorities for the benefit of the majority is exactly the evil that the United States Constitution sought to prohibit when it forbade the taking of private property for public use without just compensation. The Act directly contravenes this constitutional principle and thus should be declared unconstitutional.

33. The ultimate effect of the Act undermines the purported objective of achieving energy independence by the United States of America. Such ultimate effect imposes harm upon the American consumer and interferes with the private property protections necessary for the preservation of a free society.

WHEREFORE, plaintiffs respectfully pray and request:

1. That this Court adjudge, declare and decree that the Act is unconstitutional.

2. That this Court grant plaintiffs such other and further relief as may be just and proper in the premises.

### COUNT TWO

#### Count Seeking Refund of Excise Taxes Illegally Assessed and Collected

34. Plaintiffs refer to and by this reference adopt and reallege all of the allegations contained in Count One, with like effect as if fully repeated at length herein.

35. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1346(a)(1).

36. Taxpayer plaintiffs seek to obtain a refund of all excise taxes illegally assessed and collected under the Act where their respective refund claims have been rejected or have been filed more than six months with the Internal Revenue Service without action.

WHEREFORE, plaintiffs respectfully pray and request:

1. That this Court adjudge that the excise tax under the Act was erroneously and improperly assessed by the defendant and collected from the taxpayer plaintiffs.

2. That this Court enter an order directing and commanding the defendant to refund to each of the taxpayer

plaintiffs all payments, with interest, illegally and improperly assessed by defendant and paid by such plaintiffs under the Act.

3. That this court enter an order directing and commanding defendant to take no further action which would result in the assessment and collection of this special excise tax on the domestic taxable crude oil of domestic oil producers under the Act.

4. That this Court grant plaintiffs such other and further relief as may be just and proper.

This Second Amended and Supplemental Complaint is dated this 29th day of June, 1981.

OF COUNSEL:

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HAROLD B. SCOGGINS, JR.
*Independent Petroleum*
*Association of America*
*1101 16th Street, N.W.*
*Washington, D.C. 20036*
*(202) 957-4731*

and

BROWN, DREW, APOSTOLOS,
MASSEY & SULLIVAN
*500 Petroleum Building*
*Casper, WY 82601*

By ______________________
WM. H. BROWN

and ______________________
MICHAEL J. SULLIVAN
*Counsel for Plaintiffs*

Form 843
(Rev. June 1978)
Department of the Treasury
Internal Revenue Service

# Claim

**If your claim is for an overpayment of income taxes, do NOT use this form (see Instructions)**

Please type or print

Name of taxpayer or purchaser of stamps
Harry and Nola Grace Ptasynski

Number and street
P.O. Box 43

City or town, State, and ZIP code
Casper, Wyoming 82602

**Fill in applicable items—Use attachments if necessary**

1 Your social security number Harry Ptasynski 397-18-[illegible]
Nola Grace Ptasynski 441-20-3944

2 Employer identification number
83-0155088

3 Internal Revenue Service office where return (if any) was filed
Ogden, Utah 84201

4 Name and address shown on return, if different from above

5 Period—prepare separate form for each taxable period
From 2/29/ , 19 80 , to 3/31/ , 19 80

6 Amount to be refunded or abated
$3,696.44

7 Dates of payment
Various Dates during April, 1980

8 Type of tax
☐ Employment ☐ Estate ☒ Excise ☐ Gift ☐ Stamp Windfall Profits

9 Kind of return filed
☐ 706 ☐ 709 ☐ 720 ☐ 940 ☐ 941 ☐ 990-PF ☐ 4720 ☒ Other (specify) ▶ Windfall Profits

10 Explain why you believe this claim should be allowed and show computation of tax refund or abatement.

See attached explanation

Under penalties of perjury, I declare that I have examined this claim, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete.

Signed Harry Ptasynski
Nola Grace Ptasynski

Dated September 30, 19 80

District's Stamp
(Date received)

For Internal Revenue Service Use Only
☐ Refund of taxes illegally, erroneously, or excessively collected.
☐ Refund of amount paid for stamps unused, or used in error or excess.
☐ Abatement of tax assessed (not applicable to estate or gift taxes).

See instructions on back.

EXHIBIT A

Form 843 (Rev. 6-78)

## CLAIM
**Item 10, Form 843**

The taxpayer seeks a refund of all taxes paid by him pursuant to the Crude Oil Windfall Profit Tax, as set forth in Chapter 45 of the Internal Revenue Code, imposed by Public Law 96-223 on producers of certain domestic crude oil.

The taxpayer has paid the tax for which refund is sought, which is imposed by section 4986 of the Internal Revenue Code, and which is withheld and paid under section 4995.

The statute is unconstitutional in its entirety. In particular, the Windfall Profit Tax is unconstitutional in the following respects:

1. It constitutes a taking of private property without just compensation, in violation of the Fifth Amendment to the United States Constitution.
2. It establishes an unwarranted and irrational discrimination between the taxation of oil and of all other forms of income, in violation of the due process clause of the Fifth Amendment to the United States Constitution.
3. It is an arbitrary and irrational tax utterly unable to advance the purposes which it allegedly serves, in violation of the Fifth Amendment to the United States Constitution.
4. If in fact it is an excise tax, it is an nnconstitutional excise tax as it is not uniform throughout the United States, as required by Article 1, Section 8, Clause 1, of the United States Constitution.

The tax, in its entirety, is unconstitutional. Therefore, all amounts collected from the taxpayer, together with interest thereon from the date of collection, should be refunded.

NOTE: The listing of constitutional challenges in this claim for refund should not be viewed as waiving any procedural, computational or other grounds for refund.

INTERNAL REVENUE SERVICE CENTER
WESTERN REGION
DEPARTMENT OF THE TREASURY

741088: cf

Social Security or Employer Identification Number: 83-0185088
Document Locator Number:

Kind of Tax: Windfall Profit Tax
Tax Period Ended: March 31, 1980
Amount Claimed: $3,696.44
Date Claim Received: Oct. 22, 1980
Person to Contact: C. W. Christiansen
Contact Telephone Number: 801-626-3701 (not toll free)

Harry & Nola Grace Ptasynski
PO Box 43
Casper, WY 82602

Dear Mr. & Mrs. Ptasynski:

We are sorry, but we cannot allow your claim for an adjustment to your tax, for the reasons stated below. This letter is your legal notice that your claim is fully disallowed.

If you wish to bring suit or proceedings for the recovery of any tax, penalties, or other moneys for which this disallowance notice is issued, you may do so by filing such a suit with the United States District Court having jurisdiction, or the United States Court of Claims. The law permits you to do this within 2 years from the mailing date of this letter. However, if you signed a waiver of the notice of disallowance (Form 2297), the period for bringing suit began to run on the date the waiver was filed.

If you have any questions and wish to call us, the person whose name and telephone number are shown above will be able to help you. Since there will be a long-distance charge to you if you are beyond the immediate dialing area of the service center, you may prefer to write us at the address on this letter or call any Internal Revenue Service Office.

Sincerely yours,

By ____________________

*Director, Service Center*

Reasons for disallowance:

We are sorry, but we cannot allow your refund claim for $3,696.44 for the tax period ended March 31, 1980. The

claim is based on your view that certain tax laws are unconstitutional; only the courts have authority to pass on such matters.
Letter 105(SC)(7-77)

**EXHIBIT B**

Form 843
(Rev. June 1978)
Department of the Treasury
Internal Revenue Service

# Claim

If your claim is for an overpayment of income taxes, do NOT use this form (see instructions)

Please type or print

Name of taxpayer or purchaser of stamps
JOHN PARTRIDGE, JR.

Number and street
BOX 2134

City or town, State, and ZIP code
CASPER, WYOMING 82602

Fill in applicable items—Use attachments if necessary

1 Your social security number
567-09-3575

2 Employer identification number
N/A

3 Internal Revenue Service office where return (if any) was filed
OGDEN, UTAH

4 Name and address shown on return, if different from above
SAME

5 Period—prepare separate form for each taxable period
From 2/29, 19 80, to 9/30, 19 80

6 Amount to be refunded or abated
$1135.30

7 Dates of payment
VARIOUS DATES DURING ABOVE PERIOD

8 Type of tax
☐ Employment ☐ Estate ☐ Excise ☐ Gift ☐ Stamp WINDFALL PROFITS

9 Kind of return filed
☐ 706 ☐ 709 ☐ 720 ☐ 940 ☐ 941 ☐ 990-PF ☐ 4720 ☒ Other (specify) ▶ WINDFALL PROFIT

10 Explain why you believe this claim should be allowed and show computation of tax refund or abatement.

See atttached explanation, Form Claim Item 10, 843

Under penalties of perjury, I declare that I have examined this claim, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete.

Signed John P. Partridge Jr. Dated 10/17 1980

Director's Stamp (Date received)

For Internal Revenue Service Use Only
☐ Refund of taxes illegally, erroneously, or excessively collected.
☐ Refund of amount paid for stamps unused, or used in error or excess.
☐ Abatement of tax assessed (not applicable to estate or gift taxes).

See instructions on back.

Form 843 (Rev. 6-78)

EXHIBIT C

## CLAIM

### Item 10, Form 83

The taxpayer seeks a refund of all taxes paid by him pursuant to the Crude Oil Windfall Profit Tax, as set forth in Chapter 45 of the Internal Revenue Code, imposed by Public Law 96-223 on producers of certain domestic crude oil.

The taxpayer has paid the tax for which refund is sought, which is imposed by section 4986 of the Internal Revenue Code, and which is withheld and paid under section 4995.

The statute is unconstitutional in its entirety. In particular, the Windfall Profit Tax is unconstitutional in the following respects:

1. It constitutes a taking of private property without just compensation, in violation of the Fifth Amendment to the United States Constitution.
2. It establishes an unwarranted and irrational discrimination between the taxation of oil and of all other forms of income, in violation of the due process clause of the Fifth Amendment to the United States Constitution.
3. It is an arbitrary and irrational tax utterly unable to advance the purposes which it allegedly serves, in violation of the Fifth Amendment to the United States Constitution.
4. If in fact it is an excise tax, it is an unconstitutional excise tax as it is not uniform throughout the United States, as required by Article 1, Section 8, Clause 1, of the United States Constitution.

The tax, in its entirety, is unconstitutional. Therefore, all amounts collected from the taxpayer, together with interest thereon from the date of collection, should be refunded.

NOTE: The listing of constitutional challenges in this claim for refund should not be viewed as waiving any procedural, computational or other grounds for refund.

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
OGDEN, UT 84201

In reply refer to: 29740125
Dec. 03, 1980 LTR 105C 8222 567-09-3575

Michael J. Sullivan & William H. Brown WP2287R
Brown Drew Apostolos Massey & Sullivan
500 Protroleum Bldg
Casper, WY 82601

Social Security Number: 567-09-3575
Kind of Tax: Windfall Profit
Amount of Claim: $1,135.30
Date Claim Received: Nov. 3, 1980

Dear Taxpayers:

We are sorry, but we cannot allow your claim for an adjustment to your tax for the period ended Sept. 30, 1980. This letter is your legal notice that your claim is fully disallowed.

We have disallowed the claim because the claim is based on your view that certain tax laws are unconstitutional, only the courts have authority to pass on such matters.

Reference John Partridge Junior

If you wish to bring suit or proceedings for the recovery of any tax, penalties or other moneys for which this disallowance notice is issued, you may do so by filing such a suit with the United States District Court having jurisdiction, or the United States Court of Claims. The law permits you to do this within 2 years from the mailing date of this letter. However, if you signed a waiver of the notice of disallowance (Form 2297), the period for bringing suit began to run on the date the waiver was filed.

**EXHIBIT D**

Form **843** (Rev. June 1976) Department of the Treasury Internal Revenue Service

# Claim

**If your claim is for an overpayment of income taxes, do NOT use this form (see instructions)**

Please print or type

Name of taxpayer or purchaser of stamps: Burton W Avery - Goldie Avery

Number and street: P.O. Box 71

City or town, State, and ZIP code: Lysite Wyo

**Fill in applicable items—Use attachments if necessary**

1 Your social security number: 520-31-9005, 520-36-0222

2 Employer identification number: None

3 Internal Revenue Service office where return (if any) was filed: Ogden, Utah

4 Name and address shown on return, if different from above

5 Period—prepare separate form for each taxable period: From March 1, 1980 to March 31, 1980

6 Amount to be refunded or abated: $1340.34

7 Dates of payment: March 31, 1980

8 Type of tax: ☐ Employment ☐ Estate ☒ Excise ☐ Gift ☐ Stamp

9 Kind of return filed: ☐ 706 ☐ 709 ☐ 720 ☐ 940 ☐ 941 ☐ 990-PF ☐ 4720 ☒ Other (specify) ▶ Wind fall profits tax

10 Explain why you believe this claim should be allowed and show computation of tax refund or abatement.

The Wind fall Profits tax is going to put all the old folks who have royalty on oil either in the Poor house or on wellfare. It is the most heinous thing that has happened in this Country.

(See Attachment)

Under penalties of perjury, I declare that I have examined this claim, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete.

Signed x Burton W Avery Dated Aug 26th, 1980

Director's Stamp (Date received)

• For Internal Revenue Service Use Only

☐ Refund of taxes illegally, erroneously, or excessively collected.

☐ Refund of amount paid for stamps unused, or used in error or excess.

☐ Abatement of tax assessed (not applicable to estate or gift taxes).

See instructions on back.

EXHIBIT F

Form 843 (Rev. 6-76)

## CLAIM
### Item 10, Form 843

The taxpayer seeks a refund of all taxes paid by him pursuant to the Crude Oil Windfall Profit Tax, as set forth in Chapter 45 of the Internal Revenue Code, imposed by Public Law 96-223 on producers of certain domestic crude oil.

The taxpayer has paid the tax for which refund is sought, which is imposed by section 4986 of the Internal Revenue Code, and which is withheld and paid under section 4995.

The statute is unconstitutional in its entirety. In particular, the Windfall Profit Tax is unconstitutional in the following respects:

1. It constitutes a taking of private property without just compensation, in violation of the Fifth Amendment to the United States Constitution.
2. It establishes an unwarranted and irrational discrimination between the taxation of oil and of all other forms of income, in violation of the due process clause of the Fifth Amendment to the United States Constitution.
3. It is an arbitrary and irrational tax utterly unable to advance the purposes which it allegedly serves, in violation of the Fifth Amendment to the United States Constitution.
4. If in fact it is an excise tax, it is an unconstitutional excise tax as it is not uniform throughout the United States, as required by Artice 1, Section 8, Clause 1, of the United States Constitution.

The tax, in its entirety, is unconstitutional. Therefore, all amounts collected from the taxpayer, together with interest thereon from the date of collection, should be refunded.

NOTE: The listing of constitutional challenges in this claim for refund should not be viewed as waiving any procedural, computational or other grounds for refund.

Form 843 (Rev. June 1978) Department of the Treasury Internal Revenue Service

# Claim

**If your claim is for an overpayment of income taxes, do NOT use this form (see Instructions)**

Please type or print

Name of taxpayer or purchaser of stamps: Frederick S. Johnson

Number and street: P.O. Box 232

City or town, State, and ZIP code: Casper WY 82602

**Fill in applicable items—Use attachments if necessary**

1 Your social security number: 220-32-9076

2 Employer identification number: 83-6015551

3 Internal Revenue Service office where return (if any) was filed: Ogden, Utah

4 Name and address shown on return, if different from above

5 Period—prepare separate form for each taxable period From March 1, 1980 to March 31, 1980

6 Amount to be refunded or abated $ 73.30

7 Dates of payment: March 31, 1980

8 Type of tax

☐ Employment ☐ Estate ☒ Excise ☐ Gift ☐ Stamp

9 Kind of return filed

☐ 706 ☐ 709 ☐ 720 ☐ 940 ☐ 941 ☐ 990-PF ☐ 4720 ☒ Other (specify) ▶ Windfall profits tax

10 Explain why you believe this claim should be allowed and show computation of tax refund or abatement.

(See Attachment)

Under penalties of perjury, I declare that I have examined this claim, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete.

Signed X Frederick S. Johnson Dated Aug. 27, 1980

Director's Stamp (Date received)

For Internal Revenue Service Use Only

☐ Refund of taxes illegally, erroneously, or excessively collected.

☐ Refund of amount paid for stamps unused, or used in error or excess.

☐ Abatement of tax assessed (not applicable to estate or gift taxes).

See Instructions on back.

EXHIBIT F

Form 843 (Rev. 6-78)

## CLAIM
### Item 10, Form 843

The taxpayer seeks a refund of all taxes paid by him pursuant to the Crude Oil Windfall Profit Tax, as set forth in Chapter 45 of the Internal Revenue Code, imposed by Public Law 96-223 on producers of certain domestic crude oil.

The taxpayer has paid the tax for which refund is sought, which is imposed by section 4986 of the Internal Revenue Code, and which is withheld and paid under section 4995.

The statute is unconstitutional in its entirety. In particular, the Windfall Profit Tax is unconstitutional in the following respects:

1. It constitutes a taking of private property without just compensation, in violation of the Fifth Amendment to the United States Constitution.
2. It establishes an unwarranted and irrational discrimination between the taxation of oil and of all other forms of income, in violation of the due process clause of the Fifth Amendment to the United States Constitution.
3. It is an arbitrary and irrational tax utterly unable to advance the purposes which it allegedly serves, in violation of the Fifth Amendment to the United States Constitution.
4. If in fact it is an excise tax, it is an unconstitutional excise tax as it is not uniform throughout the United States, as required by Article 1, Section 8, Clause 1, of the United States Constitution.

The tax, in its entirety, is unconstitutional. Therefore, all amounts collected from the taxpayer, together with interest thereon from the date of collection, should be refunded.

NOTE: The listing of constitutional challenges in this claim for refund should not be viewed as waiving any procedural, computational or other grounds for refund.

843
Rev. June 1978
Department of the Treasury
Internal Revenue Service

# Claim

If your claim is for an overpayment of income taxes, do NOT use this form (see instructions)

Name of taxpayer or purchaser of stamps
CALVIN PETROLEUM CORPORATION

Number and street
2950 Security Life Building, 1616 Glenarm Place

City or town, State, and ZIP code
Denver, Colorado 80202

Fill in applicable items—Use attachments if necessary

1 Your social security number
525-38-4039 (Rodney P. Calvin)

2 Employer identification number
84-0726436

3 Internal Revenue Service office where return (if any) was filed
Ogden, Utah 84201

4 Name and address shown on return, if different from above

5 Period—prepare separate form for each taxable period
from 2/29/ , 19 80 , to 3/31/ , 19 80

6 Amount to be refunded or abated
$ 14,039.78

7 Dates of payment
Various dates during April, 1980

8 Type of tax
[ ] Employment [ ] Estate [X] Excise [ ] Gift [ ] Stamp Windfall Profits

9 Kind of return filed
[ ] 706 [ ] 709 [ ] 720 [ ] 940 [ ] 941 [ ] 990-PF [ ] 4720 [X] Other (specify) Windfall Profit

10 Explain why you believe this claim should be allowed and show computation of tax refund or abatement.

The Windfall Profit Tax is an unconstitutional tax and therefore, the entire tax paid should be refunded. Specifically, the tax violates due process, takes private property without just compensation, and is irrational and discriminatory. In addition, the tax does not meet the constitutional requirement of geographic uniformity. Calvin Petroleum Corporation reserves the right to raise additional grounds for recovering the Windfall Profit Tax amounts paid. THIS AMOUNT OF MONEY, IF PROJECTED FOR ONE YEAR, IS SUFFICIENT FOR CLAIMANT TO DRILL FOUR (4) EXPLORATORY WELLS TO AN AVERAGE DEPTH OF 4,500'.

Under penalties of perjury, I declare that I have examined this claim, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete.

Signed [signature] Date August 21, 19 80
Rodney P. Calvin, President

For Internal Revenue Service Use Only

[ ] Refund of taxes illegally, erroneously, or excessively collected.
[ ] Refund of amount paid for stamps unused, or used in error or excess.
[ ] [illegible]

[illegible]

EXHIBIT G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

No. C80-302K

Filed July 2, 1981

INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, ET AL., PLAINTIFFS,

*v.*

UNITED STATES OF AMERICA, DEFENDANT.

**ORDER GRANTING MOTIONS TO INTERVENE**

The above-entitled matter coming on regularly for hearing before the Court upon the Motions to Intervene filed by the States of Texas and Louisiana, the State of Texas appearing by and through its attorneys, Mark White, Attorney General for the State of Texas, and Stewart Fryer, Assistant Attorney General for the State of Texas, and the State of Louisiana appearing by and through its attorney, George Domas, and both states appearing by and through Roger Marzulla, Gale Norton and David Kennedy, and the defendants appearing by and through their attorneys, Robert Baker and Jeffrey Fisher, and the Court having heard the arguments of counsel in support of and in opposition to said Motions, and the Court having carefully considered the pleadings and the memoranda briefs submitted by counsel, and the Court being fully advised in the premises;

NOW, THEREFORE, IT IS ORDERED that the Motions to Intervene filed by and on behalf of the States of Texas and Louisiana be and the same are hereby granted.

Dated this 2nd day of July, 1981.

/s/ EWING T. KERR
*U.S. District Judge*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

No. C80-302K

INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, ET AL., PLAINTIFFS

*v.*

UNITED STATES OF AMERICA, DEFENDANT.

**ORDER DENYING DEFENDANT'S MOTION TO DISMISS**

The above-entitled matter coming on regularly for hearing before the Court upon the Motion filed by the United States of America to dismiss the Complaint of plaintiffs, and plaintiffs appearing by and through their attorneys, William H. Brown, Stephen F. Williams and Harold B. Scoggins, Jr., and defendant appearing by and through its attorneys, Robert Bauer and Jeffrey Fisher, and the Court having allowed the filing of plaintiffs' Second Amended and Supplemental Complaint, and the Court having heard the arguments of counsel in support of and in opposition to the Motion to Dismiss as it may apply to the Second Amended and Supplemental Complaint, and having carefully considered the pleadings relating thereto and the memoranda briefs submitted by counsel, and the Court being fully advised in the premises;

NOW, THEREFORE, IT IS ORDERED that the Motion to Dismiss filed by and on behalf of the defendant is denied as to plaintiffs Partridge, Ptasynski, Avery, Johnson and Calvin Petroleum; it is

FURTHER ORDERED that defendants be given thirty (30) days from the date of this Order within which time to answer or otherwise plead; it is

FURTHER ORDERED that the Motion of defendant to dismiss as to the remaining plaintiffs is granted, provided that such plaintiffs shall remain parties to the action as permissive intervenors, as their interests may appear without further pleading on their part and in all subsequent plead-

ings herein such parties shall be designated intervenors rather than plaintiffs.

Dated this 26th day of August, 1981.

/s/ Ewing T. Kerr
*U.S. District Judge*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

No. C80-0302

INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA,
ET AL., PLAINTIFFS

*v.*

UNITED STATES OF AMERICA, DEFENDANT

*v.*

STATE OF LOUISIANA, STATE OF TEXAS,
INTERVENORS-PLAINTIFFS

## ANSWER

Comes now the defendant, United States of America, by and through its counsel of record, Richard A. Stacy, United States Attorney for the District of Wyoming, Robert L. Baker, Trial Attorney, Tax Division, Department of Justice, and for its answer to the Petition in Intervention of The State of Texas, Intervenor-Plaintiff, responds as follows:

Denies each and every allegation of such complaint not admitted, qualified or otherwise specifically referred to below.

Further answering, defendant says that it:

1. Admits the allegations contained in paragraph 1 of intervenor-plaintiff's complaint.

2. Denies the allegations contained in paragraph 2 of intervenor-plaintiff's complaint.

3. Denies the allegations contained in paragraph 3 of intervenor-plaintiff's complaint.

4. Denies the allegations contained in paragraph 4 of intervenor-plaintiff's complaint.

5. Admits the allegations contained in paragraph 5 of intervenor-plaintiff's complaint.

6. Admits that the State of Texas entered the Union on December 29, 1845, but lacks information or knowledge sufficient to form a belief as to the remaining allegations con-

tained in paragraph 6 of intervenor-plaintiff's complaint and, therefore, denies them.

7. Admits the allegations contained in paragraph 7 of intervenor-plaintiff's complaint.

8. Admits the allegations contained in paragraph 8 of intervenor-plaintiff's complaint.

9. Admits that one geographic exemption is found in 26 U.S.C. Sec. 4994(e).

10. Admits the allegations contained in paragraph 10 of the intervenor-plaintiff's complaint.

11. Denies the allegations contained in paragraph 11 of intervenor-plaintiff's complaint except admits that the legislative purpose of the Windfall Profit tax was, among others, to reduce dependence of the United States upon imported oil and to encourage production of oil.

12. Denies the allegations contained in paragraph 12 of intervenor-plaintiff's compliant.

13. Admits the allegations contained in paragraph 13 of intervenor-plaintiff's complaint.

14. Lacks information or knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph 14 of intervenor-plaintiff's complaint, and, therefore, denies them.

15. Denies the allegations contained in paragraph 15 of the intervenor-plaintiff's complaint.

16. Lacks information or knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph 16 of intervenor-plaintiff's complaint, and, therefore, denies them.

17. Denies the allegations contained in paragraph 17 of the intervenor-plaintiff's complaint.

18. Denies the allegations contained in paragraph 18 of the intervenor-plaintiff's complaint.

19. Denies the allegations contained in paragraph 19 of the intervenor-plaintiff's complaint.

20. Denies the allegations contained in paragraph 20 of the intervenor-plaintiff's complaint.

21. Denies the allegations contained in paragraph 21 of the intervenor-plaintiff's complaint.

22. Denies the allegations contained in paragraph 22 of the intervenor-plaintiff's complaint.

WHEREFORE, defendant prays that judgment be entered in favor of the United States, that intervenor-plaintiff's complaint be dismissed with prejudice and that this Court grant such other and additional relief as it deems proper.

RICHARD S. STACY
*United States Attorney*

OF COUNSEL:
/s/ Robert L. Baker
ROBERT L. BAKER
*Trial Attorney*
*Tax Division*
*Department of Justice*
*Washington, D.C. 20530*
*724-6513*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

No. C80-0302

INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, ET AL., PLAINTIFFS

*v.*

UNITED STATES OF AMERICA, DEFENDANT,

*v.*

STATE OF LOUISIANA, STATE OF TEXAS, INTERVENORS-PLAINTIFFS

## ANSWER

Comes now the defendant, United States of America, by and through its counsel of record, Richard A. Stacy, United States Attorney for the District of Wyoming, Robert L. Baker, Trial Attorney, Tax Division, Department of Justice, and for its answer to the Petition in Intervention of The State of Louisiana, Intervenor-Plaintiff, responds as follows:

Denies each and every allegation of such complaint not admitted, qualified or otherwise specifically referred to below.

Further answering, defendant says that it:

1. Admits the allegations contained in paragraph 1 of intervenor-plaintiff's complaint, but denies the allegation that the Act is unconstitutional.

2. Denies the allegations contained in paragraph 2 of intervenor-plaintiff's complaint.

3. Admits the allegations contained in paragraph 3 of intervenor-plaintiff's complaint.

4. Lacks information or knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph 4 of intervenor-plaintiff's complaint and, therefore, denies them.

5. Denies that plaintiffs Arch W. Deuel and William Edward Wolff filed claims for refunds with the Internal

Revenue Service or received notices of disallowances of those claims from the Internal Revenue Service. Admits that only the following plaintiffs filed claims for refund on the dates indicated:

| *Plaintiff* | *Claim filed* | *Period of Claim* |
|---|---|---|
| (a) H. Ptasynski | 10/22/80 | 2/29/80—3/31/80 |
| (b) B & G. Avery | 10/22/80 | 3/1/80—3/31/80 |
| (c) F. Johnson | 10/22/80 | 3/1/80—3/31/80 |
| (d) J. Partridge, Jr. | 11/3/80 | 2/29/80—9/30/80 |
| (e) Calvin Petroleum Corporation | 8/25/80 | 2/29/80—3/31/80 |

Further admits that the claims for refunds filed by plaintiffs H. Ptasynski and B. & G. Avery were disallowed by the Internal Revenue Service on November 13, 1980 and that the claim for refund filed by J. Partridge was disallowed by the Internal Revenue Service on December 3, 1980. Lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 5 of intervenor-plaintiff's complaint and, therefore, denies them.

6. Admits the allegations contained in paragraph 6 of intervenor-plaintiff's complaint.

7. Admits that the intervenor-plaintiff is the State of Louisiana, but lacks information or knowledge sufficient to form a belief as to the remaining allegations in paragraph 7 of intervenor-plaintiff's complaint and, therefore, denies them.

8. Admits the allegations contained in paragraph 8 of intervenor-plaintiff's complaint except avers that 26 U.S.C. 4994(c) is also, in effect, a geographic exemption.

9. Admits the allegations contained in paragraph 9 of intervenor-plaintiff's complaint.

10. Admits the allegations contained in paragraph 10 of intervenor-plaintiff's complaint.

11. Admits the allegations contained in paragraph 21 of intervenor-plaintiff's complaint.

12. Admits that the Crude Oil Windfall Profit Tax is an excise tax, but denies the remaining allegations contained in paragraph 12 of intervenor-plaintiff's complaint.

13. Denies the allegations contained in paragraph 13 of intervenor-plaintiff's complaint.

14. Admits the allegations contained in the first sentence of paragraph 14 of intervenor-plaintiff's complaint, but denies the allegations contained in the second sentence of paragraph 14.

15. Admits the allegations contained in paragraph 15 of intervenor-plaintiff's complaint.

16. Denies the allegations contained in paragraph 16 of intervenor-plaintiff's complaint.

17. Denies the allegations contained in paragraph 17 of intervenor-plaintiff's complaint.

18. Denies the allegations contained in paragraph 18 of intervenor-plaintiff's complaint.

WHEREFORE, defendant prays that judgment be entered in favor of the United States, that intervenor-plaintiff's complaint be dismissed with prejudice and that this Court grant such other and additional relief as it deems proper.

RICHARD S. STACY
*United States Attorney*

OF COUNSEL:

/s/ Robert L. Baker

ROBERT L. BAKER
*Trial Attorney*
*Tax Division*
*Department of Justice*
*Washington, D.C. 20530*
*724-6513*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

No. C80-0302

JOHN PARTRIDGE, HARRY PTASYNSKI, BERTON W. AVERY, GOLDIE AVERY, FREDERICK S. JOHNSON AND CALVIN PETROLEUM, PLAINTIFFS

*v.*

UNITED STATES OF AMERICA, DEFENDANT

*v.*

STATE OF TEXAS, STATE OF LOUISIANA, INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, ET AL., INTERVENORS

## ANSWER

Comes now the defendant, United States of America, by and through its counsel of record, Richard A. Stacy, United States Attorney for the District of Wyoming, Robert L. Baker, Trial Attorney, Tax Division, Department of Justice, and for its answer to the Plaintiffs' Second Amended and Supplemental Complaint ("Complaint") responds as follows:

Denies each and every allegation of such complaint not admitted, qualified or otherwise specifically referred to below.

Further answering, defendant says that it:

## COUNT ONE

1. Admits the allegations set forth in the first two sentences of paragraph 1 of plaintiffs' complaint, but denies any averments that may be contained in the remaining allegations in paragraph 1.

2. Denies the allegations contained in paragraph 2 of plaintiffs complaint.

3. Admits the allegations contained in paragraph 3 of plaintiffs' complaint.

4. Lacks information or knowledge sufficient to form a belief as to the allegations contained in paragraph 4 of the plaintiff's complaint, and, therefore, denies them.

5. Lacks information or knowledge sufficient to form a belief as to the allegations contained in paragraph 5 of plaintiffs' complaint, and, therefore, denies them.

6. Admits that plaintiff, Harry Ptasynski, is a citizen of the State of Wyoming and is an independent oil producer; that he has had an excise tax imposed on a portion of his domestic taxable crude oil under the Act and that one or more purchasers of production from this plaintiff has withheld from payments for domestic taxable crude oil the tax under the Act for the taxable period ending March 31, 1980; that on October 22, 1980, Ptasynski filed a claim for refund (Form 843) with the Internal Revenue Service which was disallowed on November 13, 1980; that defendant lacks information or knowledge sufficient to form a belief as to the remaining allegations contained in paragraph 6 of plaintiffs' complaint, and, therefore, denies them.

7. Admits that plaintiff, John Partridge, is a citizen of the State of Wyoming and is an independent oil producer; that he has had an excise tax imposed on a portion of his domestic taxable crude oil under the Act and one or more purchasers of production from this plaintiff has withheld from payments for domestic taxable crude oil the tax under the Act for the taxable period ending March 31, 1980; that on November 3, 1980, Partridge filed a claim for refund (Form 843) with the Internal Revenue Service which was disallowed on December 3, 1980; that defendant lacks information or knowledge sufficient to form a belief as to the remaining allegations contained in paragraph 7 of plaintiffs' complaint, and, therefore, denies them.

8. Admits that plaintiffs, Berton W. Avery and Goldie Avery, are citizens of the State of Wyoming and are royalty owners who have had excise taxes withheld from their royalty payments under the Act for the taxable period ending March 31, 1980; that on October 22, 1980, Berton W. and Goldie Avery filed a claim for refund (Form 843) with the Internal Revenue Service which was disallowed on November 13, 1981; that defendant lacks information or knowledge

sufficient to form a belief as to the remaining allegations contained in paragraph 6 of plaintiffs' complaint, and, therefore, denies them.

9. Admits that plaintiff, Frederick S. Johnson, is a citizen of the State of Wyoming and is royalty owner who has had excise taxes withheld from his royalty payments under the Act for the taxable period ending March 31, 1980; that on October 22, 1980, Johnson filed a claim for refund (Form 843) with the Internal Revenue Service which has not been acted upon by the Internal Revenue Service; that defendant lacks information or knowledge sufficient to form a belief as to the remaining allegations contained in paragraph 9 of plaintiffs' complaint, and, therefore, denies them.

10. Admits that plaintiff, Calvin Petroleum Corp., is both a royalty owner and an independent domestic oil producer; that it has had an excise tax imposed on a portion of its domestic taxable crude oil under the Act and one or more purchasers of production from this plaintiff has withheld from payments for domestic taxable crude oil the tax under the Act for the taxable period ending March 31, 1980; that on August 25, 1980, Calvin filed a claim for refund (Form 843) with the Internal Revenue Service; that defendant lacks information or knowledge sufficient to form a belief as to the remaining allegations contained in paragraph 10 of plaintiffs' complaint, and, therefore, denies them.

11. Except insofar as defendant admits in paragraphs 6 through 10, above, the allegations contained in paragraph 6 through 10 of plaintiffs' complaint, defendant lacks knowledge or information sufficient to form a belief as to the remaining allegations in paragraph 11 of plaintiffs' complaint and, therefore, denies them.

12. Admits the allegations contained in paragraph 12 of plaintiffs' complaint.

13. Denies any averments that may be contained in the allegations set forth in paragraph 13 of plaintiffs' complaint.

14. Admits the allegations contained in paragraph 14 of plaintiffs' complaint.

15. Denies any averments that may be contained in the allegations set forth in paragraph 15 of plaintiffs' complaint.

16. Admits the allegations contained in paragraph 16 of plaintiffs' complaint.

17. Denies any averments that may be contained in paragraph 17 of plaintiffs' complaint and further states that the Constitution speaks for itself as to meaning and content.

18. Admits the allegations contained in paragraph 18 of plaintiffs' complaint.

19. Denies the allegations contained in paragraph 19 of plaintiffs' complaint.

20. Denies the allegations contained in paragraph 20 of plaintiffs' complaint.

21. Denies any averments that may be contained in the allegations set forth in paragraph 21 of plaintiffs' complaint.

22. Denies the allegations contained in paragraph 22 of plaintiffs' complaint.

23. Denies any averments that may be contained in the allegations set forth in paragraph 23 of plaintiffs' complaint.

24. Denies the allegations contained in paragraph 24 of plaintiffs' complaint.

25. Denies the allegations contained in paragraph 25 of plaintiffs' complaint.

26. Denies the allegations contained in paragraph 26 of plaintiffs' complaint.

27. Denies the allegations contained in paragraph 27 of plaintiffs' complaint.

28. Denies the allegations contained in paragraph 28 of plaintiffs' complaint.

29. Lacks information or knowledge sufficient to form a belief as to the allegations contained in paragraph 29 of plaintiffs' complaint, and, therefore, denies them.

30. Denies the allegations contained in paragraph 30 of plaintiffs' complaint.

31. Denies the allegations contained in paragraph 31 of plaintiffs' complaint.

32. Denies the allegations contained in paragraph 32 of plaintiffs' complaint.

33. Denies the allegations contained in paragraph 33 of plaintiffs' complaint.

COUNT TWO

34. Defendant incorporates by references its responses to the allegations contained in Count One of plaintiffs' complaint.

35. Denies the allegations contained in paragraph 35 of plaintiffs' complaint.

36. Admits the allegations contained in paragraph 36 of plaintiffs' complaint except denies that the excise taxes assessed under the Act were illegally assessed or collected.

WHEREFORE, the defendant, United States of America, having answered plaintiffs' complaint, prays that judgment be entered in favor of the United States of America, that plaintiffs' complaint be dismissed with prejudice and that this Court grant such other and additional relief as it deems proper.

RICHARD A. STACY
*United States Attorney*

*OF COUNSEL*

/s/ Robert L. Baker

ROBERT L. BAKER
*Trial Attorney*
*Tax Division*
*Department of Justice*
*Washington, D.C. 20530*

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

No. C80-302K

INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, ET AL., PLAINTIFFS-INTERVENORS

*v.*

UNITED STATES OF AMERICA, DEFENDANT

**MOTION OF THE STATE OF LOUISIANA FOR SUMMARY JUDGMENT**

Plaintiff-in-intervention, the State of Louisiana, through its undersigned counsel, hereby moves the Court under the provisions of Rule 56 of the Federal Rules of Civil Procedure for the entry of a summary judgment in its favor and against defendant, The United States of America, on the ground that, as will appear from the pleadings on file herein, there is no genuine issue as to any material fact and plaintiff-in-intervention is entitled to judgment as a matter of law (1) declaring that Title I of the Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223, violates the Uniformity Clause of the United States Constitution, Art. I, § 8, cl. 1, and is therefore unconstitutional, and (2) permanently enjoining and restraining the Commissioner of the Internal Revenue Service from enforcing, implementing, or taking any further action which results in the assessment or collection of the Windfall Profit Tax.

In support of it motion for summary judgment, the State of Louisiana attaches hereto and makes a part hereof its Statement of Material Facts As To Which There Is No Genuine Issue and its Memorandum In Support of Motion of the State of Louisiana For Summary Judgment.

Respectfully submitted,

LISKOW & LEWIS
/s/: Gene W. Lafitte
GENE W. LAFITTE
L. LINTON MORGAN
GEORGE J. DOMAS
DEBORAH BAHN PRICE
JOE B. NORMAN
ANNE E. TATE
*One Shell Square, 50th Floor*
*New Orleans, LA 70139-5099*
*Telephone: (504) 581-7979*

KENNEDY, CONNOR & HEALEY
By: ______________________
DAVID KENNEDY
*P. O. Box 607*
*Sheridan, Wyoming 82801*
*Telephone: (307) 672-2491*

MOUNTAIN STATES LEGAL FOUNDATION
By: ______________________
*Roger J. Marzulla*
*Gale A. Norton*
*1200 Lincoln Street, Suite 600*
*Denver, CO 80203*
*Telephone: (303) 861-0244*
*Attorneys for the State of Louisiana*

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

No. C80-0302

INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, ET AL., PLAINTIFFS-INTERVENORS,

*v.*

UNITED STATES OF AMERICA, DEFENDANT,

**MOTION OF PLAINTIFFS PARTRIDGE, PTASYNSKI, AVERY AND CALVIN PETROLEUM FOR SUMMARY JUDGMENT**

Plaintiffs above named through their undersigned counsel, hereby move the Court under the provisions of Rule 56 of the Federal Rules of Civil Procedure for the entry of a summary judgment in their favor and against defendant, The United States of America, on the grounds that there is no genuine issue as to any material facts and plaintiffs are entitled to judgment as a matter of law. In support of the motion plaintiffs refer the Court to:

1. The pleadings before the Court in this matter.
2. The Affidavit of Kye Trout, Jr. filed with this Motion.
3. The Statement of Facts as to which There Are No Genuine Issues filed with this motion.
4. Plaintiffs' memorandum in support of Motion For Summary Judgment filed herewith.

WHEREFORE, plaintiffs request that the Court determine plaintiffs are entitled to Summary Judgement as a matter of law and grant the following relief:

1. Declaration that Title I of the Crude Oil Windfall Profit Tax of 1980 becoming a public law no. 96223 is unconstitutional;
2. Adjudge that the excise tax under the Act was erroneously and improperly assessed by the defendant and collected from the taxpayer plaintiffs;
3. Order the defendant to refund to each of the taxpayer plaintiffs all payments for which refund has been requested and refused, with interest, illegally and improperly assessed by defendant and paid by plaintiffs;

4. Direct defendant to take no further action which would result in the assessment and collection of the special excise tax covered by the Complaint on domestic taxable crude oil under the Act; and

5. That this Court grant plaintiffs such other and further relief as may be just and proper.

Respectfully submitted this 15 day of February, 1982.

OF COUNSEL:

STEPHEN F. WILLIAMS
ROBERT F. NAGEL
*Professors of Law*
*University of Colorado School of Law*
*Campus Box 410*
*Boulder, CO 80309*

HAROLD B. SCOGGINS, JR.
*Independent Petroleum Association of America*
*1101 16th Street, N.W.*
*Washington, D.C. 20036*
*(202) 957-4731*

and

BROWN, DREW, APOSTOLOS, MASSEY & SULLIVAN
*500 Petroleum Building*
*Casper, WY 82601*

By __________________
WM. H. BROWN

and

/s/ Michael J. Sullivan
MICHAEL J. SULLIVAN
*Counsel for Plaintiffs*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

C80-0302

INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA,
ET AL., PLAINTIFFS,

*v.*

UNITED STATES OF AMERICA, DEFENDANT.

STATE OF NORTH DAKOTA

SS:

COUNTY OF BURLEIGH

**AFFIDAVIT**

KYE TROUT, JR., being first duly sworn, upon oath deposes and says:

My name is Kye Trout, Jr. I am a resident of Bismark, North Dakota. For a period of more than twenty-five years last past I have been engaged actively in the business of exploring for and producing oil and gas in the United States of America as an independent producer. I am chairman of the Board of Independent Petroleum Association of America (IPAA). The president of IPAA is C. John Miller.

Mr. Miller and I were invited by Atlantic Richfield Company and its wholly owned subsidiary, ARCO Alaska Inc., to examine certain Alaskan oil and gas properties in which ARCO Alaska Inc. has an interest. Between and including the dates of January 11 through January 15, 1982, Mr. Miller and I were guests of Mr. Paul Norgaard, president of ARCO Alaska Inc., and Mr. William W. Phelps, administrative assistant to the president of Atlantic Richfield Company, the parent company of ARCO Alaska Inc.

On that tour of Alaskan properties we inspected all of the facilities of ARCO Alaska Inc. in the Prudhoe Bay area and at Valdez, same being the opposite ends of Trans-Alaskan Pipeline System. We also inspected the Kuparuk River field which has been drilled and developed by ARCO Alaska Inc. The Kuparuk River field is in that part of the State of Alaska described in the Windfall Profit Tax Act in Sections 4991(b) and 4994(e), which is an area in which oil is

produced which is exempt from the taxing provisions of the Windfall Profit Tax Act.

During the inspection tour of production facilities, including the Kuparuk River field mention above and at the time stated, we learned from the officials of Atlantic Richfield Company and ARCO Alaska Inc. that the discovery well drilled in the Kuparuk River field was completed in the year 1969, and that during the time from 1969 through 1981 a total of seventy-one wells have been drilled. We also learned that on December 14, 1981 production in the Kuparuk River field was initiated and by the end of December 1981, the daily average rate of oil production from said producing wells in said field was approximaely 80,000 barrels of oil per day. The above named officials of Atlantic Richfield Company and ARCO Alaska Inc. advised us that the projections made by ARCO Alaska Inc. in the due course of its business show that by the end of the year 1982, the daily average production of oil from the Kuparuk River field will approximate 250,000 barrels of oil per day. The completion date of the earliest producing well which is now producing in said field was February 2, 1976.

During our tour of the wells and producing facilities in the Kuparuk River field at the above stated times we observed oil actually being produced from wells in that field and the storage tanks into which such oil was being produced.

At IPAA we requested the Alaska Oil and Gas Conservation Commission to provide us the data which it had compiled on oil and gas production in the Kuparuk River field, in response to which we received the letter which is attached to this affidavit as Exhibit "A" and the Monthly Production and Injection Report which was enclosed with said Exhibit "A", which is marked as Exhibit "B". Exhibit "A" and Exhibit "B" are incorporated herein as a part of this affidavit. The letter from the Alaska Commission and its official report of production point out that production from that field commenced on December 14, 1981 and current production rates average slightly over 80,000 barrels of oil per day.

This affidavit is made for the purpose of showing that oil has been and is now being produced in commercial quantities by ARCO Alaska Inc. in the Kuparuk River field; that the daily average quantities of oil being produced are increasing and are projected to treble between the first of January 1982 and the end of December 1982. This affidavit is made for use in connection with a Motion for Summary Judgment which is projected to be filed in the above captioned case on or about February 16, 1982, and to evidence the personal knowledge of affiant as to the facts stated herein.

FURTHER Affiant sayeth not.

---

KYE TROUT, JR.

SWORN TO BEFORE ME AND SUBSCRIBED IN MY PRESENCE THIS ____ DAY OF FEBRUARY, 1982.

MY COMMISSION EXPIRES:

____________________

____________________

*Notary Public*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

No. C80-0302K

INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, ET AL., PLAINTIFFS

AND

STATE OF TEXAS, ET AL., INTERVENOR-PLAINTIFFS

*v.*

UNITED STATES OF AMERICA, DEFENDANT

**MOTION OF THE STATE OF TEXAS FOR SUMMARY JUDGMENT**

The State of Texas, Intervenor-Plaintiff, by and through its Attorney General, Mark White, hereby moves for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. In support of its motion, Texas would show the Court the following:

I.

By its order of July 2, 1981, Texas' motion for leave to intervene in this cause was granted, thereby affording Texas the status of a full party. In its complaint in intervention, Texas seeks to have the Crude Oil Windfall Profit Tax of 1980, Pub. L. No. 96-223, declared unconstitutional and enjoined in its enforcement.

II.

Texas now moves the Court to declare the Crude Oil Windfall Profit Tax of 1980 to be unconstitutional as contrary to the uniformity clause of article I, section 8, clause 1 of the Constitution. Texas files herewith a brief in support of its motion and incorporates that brief herein for all purposes.

Respectfully submimtted,

MARK WHITE
*Attorney General of Texas*

JOHN W. FAINTER, JR.
*First Assistant Attorney General*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

No. C80-0302

JOHN PARTRIDGE, HARRY PTASYNSKI, BERTON W. AVERY, GOLDIE AVERY, FREDERICK S. JOHNSON AND CALVIN PETROLEUM, PLAINTIFFS

*v.*

UNITED STATES OF AMERICA, DEFENDANT

*v.*

STATE OF TEXAS, STATE OF LOUISIANA, INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, ET AL. INTERVENORS

**CROSS MOTION OF DEFENDANT FOR SUMMARY JUDGMENT**

Pursuant to Rule 56 of the Federal Rules of Civil Procedure the defendant, United States of America, hereby moves this Court for an order entering summary judgment in favor of the United States because there is no genuine issue of material fact herein and defendant is entitled to judgment as a matter of law.

This motion is based on the pleadings, affidavits and briefs filed in this action and the grounds as set forth in defendant's briefs.

RICHARD A. STACY
*United States Attorney*

*OF COUNSEL:*

ROBERT LIVINGSTON

/s/ Robert L. Baker

ROBERT L. BAKER
*Tax Division*
*U.S. Department of Justice*
*Washington, D.C. 20530*

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

No. C80-0302

JOHN PARTRIDGE, HARRY PTASYNSKI, BERTON W. AVERY, GOLDIE AVERY, FREDERICK S. JOHNSON AND CALVIN PETROLEUM, PLAINTIFFS

*v.*

UNITED STATES OF AMERICA, DEFENDANT

*v.*

STATE OF TEXAS, STATE OF LOUISIANA, INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, ET AL. INTERVENORS

**AFFIDAVIT**

HOYLE H. HAMILTON, being duly sworn, deposes and says:

1. From January 1, 1979 to December 31, 1981, I served as a Commissioner on and Chairman of the Alaska Oil and Gas Conservation Commission (hereinafter referred to as "Commissioner"). See Alaska Statutes Section 31.05.005, et seq.

2. The authority of the Commission is applicable statewide including all land within the State of Alaska. See Alaska Statutes Section 31.05.027 and Regulation 20AAC25.505.

3. The powers and duties of the Commission are set forth in Alaska Statutes Section 31.05.030, *et seq.*

4. During my tenure as a Commissioner on and Chairman of the Commission, my principal duties and responsibilities were to oversee the day-to-day operation of the Commission and supervise the discharge of the statutorily prescribed duties and responsibilities of the Commission. See Alaska Statutes Sec. 31.05.027, *et seq.*

5. Pursuant to the power and authority vested in the Commission, all operators of oil wells in the State of Alaska are required to file, among other information, monthly production data and reports with the Commission. See Alaska

Statutes Section 31.05.030(d) and Regulations 20 AAC Sections 25.430,25.505 and 25.515. This information is made available periodically to the public via the publication by the Commission of monthly and annual reports entitled, respectively, Bulletin and Statistical Report. See Regulations 20 AAC 25.537.

6. During the period February 28, 1980 through October 1, 1980, the only production of oil in the State of Alaska from a well located north of the Arctic Cicle and/or north of the Alaska-Aleutian Range was from the Prudhoe Bay field, Prudhoe oil pool (reservoir), producing from the Sadlerochit formation.

/s/ Hoyle H. Hamilton
HOYLE H. HAMILTON

SUBSCRIBED AND SWORN TO BEFORE ME THIS 27TH DAY OF JANUARY 1982, AT SEATTLE, WASHINGTON.

/s/ ______________________
*Notary Public*

My Commission expires: July 20, 1982

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

No. C80-0302

JOHN PARTRIDGE, HARRY PTASYNSKI, BERTON W. AVERY, GOLDIE AVERY, FREDERICK S. JOHNSON AND CALVIN PETROLEUM, PLAINTIFFS

*v.*

STATE OF TEXAS, STATE OF LOUISIANA, INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, ET AL., INTERVENORS

**AFFIDAVIT**

LONNIE C. SMITH, being duly sworn, desposes and says:

1. From January 1, 1979 to the present, I have served as a Commissioner on the Alaska Oil and Gas Conservation Commission (hereinafter referred to as "Commission"). See Alaska Statutes Section 31.05.005, *et. seq.*

2. The authority of the Commission is applicable statewide including all land within the State of Alaska. See Alaska Statutes Section 31.05.027 and Regulations 20AAC25.505.

3. The powers and duties of the Commission are set forth in Alaska Statutes Section 31.05.030, *et seq.*

4. During my tenure as a Commissioner on the Commission, my principal duties and responsibilities are and were to assist and participate in the supervision of the day-today operation of the Commission and the discharge of the statutorily prescribed duties and responsibilities of the Commission. See Alaska Statutes Sec. 31.05.027, *et seq.*

5. Pursuant to the power and authority vested in the Commission, all operators of oil wells in the State of Alaska are required to file, among other information, monthly production data and reports with the Commission. See Alaska Statutes Section 31.05.030(d) and Regulations 20 AAC Sections 25.430,25.505 and 25.515. This information is made available periodically to the public via the publication by the Commission of monthly and annual reports entitled, re-

spectively, Bulletin and Statistical Report. See Regulations 20 AAC 25.537.

6. During the period February 28, 1980 through October 1, 1980, the only production of oil in the State of Alaska from a well located north of the Arctic Circle and/or north of the Alaska-Aleutian Range was from the Prudhoe Bay field, Prudhoe oil pool (reservoir), producing from the Sadlerochit formation.

/s/ Lonnie C. Smith
LONNIE C. SMITH

Subscribed and sworn to before me this 11th day of January 1982 at Anchorage, Alaska.

My Commissions expires: May 20, 1985

/s/ Dickie R. Price
DICKIE R. PRICE
*Notary Public*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

No. C82-0050

JOHN PARTRIDGE, PLAINTIFF,

*v.*

UNITED STATES OF AMERICA, DEFENDANT

## COMPLAINT

COMES NOW the plaintiff and for his complaint against the defendant respectfully allege and represent as follows:

### COUNT ONE

#### I. Nature of the Action

1. This action arises under the Internal Revenue Laws of the United States of America. This action challenges the constitutionality of Title I of the Crude Oil Windfall profit Tax Act of 1980 (the "Act") (Public Law 96-223 entitled "Windfall Profit Tax on Domestic Crude Oil"). Although called a tax on profits, the tax imposed by the Act is an excise tax on produced domestic taxable crude oil. Plaintiff seeks to obtain a refund of the special excise taxes that have been illegally imposed on the domestic taxable crude oil of domestic oil producers and that have been illegally collected under the Act.

#### II. JURISDICTION

2. The jurisdiction of this Court is invoked under 28 U.S.C. § 1331(a) providing for original jurisdiction in the District Court of the United States over any suits arising under the Constitution and the laws of the United States of America. The jurisdiction of this Court is also invoked under the provisions of 28 U.S.C. § 1346(a)(1); the Federal Mandamus Statute (Public Law 87-749, 76 Stat. 744; 28 U.S.C. § 1361 *et. seq.*); Article I, Section 8, Clause 1 of the United States Constitution, and Amendment V of the United States Constitution.

**III. Venue**

3. This action is properly brought in this judicial district under the venue provisions of 28 U.S.C. § 1391(e) and 28 U.S.C. § 1402(a).

**IV. Parties**

4. Plaintiff, John Partridge, is a citizen of the State of Wyoming. Plaintiff Partridge is an independent domestic oil producer. Plaintiff Partridge has had a special excise tax imposed on a portion of his domestic taxable crude oil under the Act. Each purchaser of production from this plaintiff has withheld from payments for crude oil the tax under the Act for all taxable periods since March 1, 1980. Plaintiff Partridge is a consumer of petroleum products, some of which are prepared for domestic crude oil subject to the tax under the Act. Plaintiff taxpayer filed a claim for refund (Form 843) with the District Director of the United States Internal Revenue Service office at Cheyenne, Wyoming on or about October 17, 1980 in accordance with instructions by such Director to counsel for plaintiff. The claim which covered the period March 1, 1980 to September 30, 1980 was rejected and disallowed, a copy of the claim and rejection are attached hereto as Exhibits "A" & "B". As a result of such rejection plaintiff has filed and is currently a party to Civil Action No. C80-0302 pending before this Court. As a result of technical objections made by the defendant as to the filing of such claim for refund, plaintiff Partridge filed an appropriate and supplementary claim for refund (Form 843) with the District Director of the United States Internal Revenue Service Office at Cheyenne, Wyoming on or about June 25, 1981 covering the period March 1, 1980 to December 31, 1980. A copy of this claim for refund is attached hereto as Exhibit "C". More than six months has elapsed since the filing of such claim and under applicable statutes the same is accordingly deemed denied (26 U.S.C. 6532).

5. In each of the instances alleged in paragraph 6 above, the first purchaser of such domestic taxable crude oil, pursuant to the mandate of the Act, has deducted and withheld payment from the owners of said crude oil for that portion

of said crude oil equal to the calculated or estimated amount of the tax for payment over to the United States of America and, on information and belief, has paid into the Treasury of the United States of America all such sums withheld in accordance with the requirements of the Act, all without any consent or approval by the plaintiff herein.

6. Defendant is the United Stated of America.

**V. Public Law 96-223**

7. The Act (P.L. 96-223) imposes, effective March 1, 1980, a tax on all domestic taxable crude oil produced after February 29, 1980. Although called a tax on profits, the tax is a temporary excise tax on produced domestic taxable crude oil, imposed when the crude oil is removed from the premises. The tax is imposed on the holder of the economic interest in the oil, called the "producer" under the Act. Primary collection responsibility, however, is on the first purchaser of the crude oil. Domestically produced crude oil is subject to this excise tax unless it is specifically exempted by the Act. The Act provides for five different categories of exemptions, which are determined either on the basis of ownership classification or the location of the wells from which the oil is produced.

8. Under § 101(a)(1) of the Act, the taxable period of March 1, 1980 to March 31, 1980, is designated as a separate and complete taxable period [26 U.S.C. § 4996(b)(7)(a)]. Each calendar quarter beginning after March 31, 1980, is a separate and complete taxable period under the Act.

**VII. The Act is Unconstitutional**

9. One of the exemptions granted under the Act is on the basis of where the oil is located. The Act excludes certain Alaskan oil from the operation of the tax. [26 U.S.C. § 4991(b)(3)].

10. Section 101(a)(1) of the Act [26 U.S.C. § 4994(e)] defines exempt Alaskan oil as any crude oil (other than Sadlerochit oil) which is produced:

> "(1) from a reservoir from which oil has been produced in commercial quantities through a well located north of the Arctic Circle, or

"(2) from a well located on the northly side of the divide of the Alaska-Aleutian Range and at least 75 miles from the nearest point on the Trans-Alaska Pipeline System."

11. The United States Constitution, Article I, Section 8, Clause 1 provides:

"The Congress shall have power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; *but all* Duties, Imposts and *Excises shall be uniform throughout the United States.*" (Emphasis Added.)

This Constitutional requirement means that excise taxes must be levied uniformly on a geographical basis.

12. Section 101(a)(1) of the Act [26 U.S.C. § 4986(a)] classifies the tax as an excise tax.

13. Because the tax is not levied uniformly throughout the United States, it violates Article I, Section 8, Clause 1 of the United States Constitution.

14. This lack of uniformity results in unwarranted discrimination against those persons upon whose domestic taxable crude oil the tax is levied.

15. Congress designed the tax to raise $227.3 billion in tax revenues over the period the tax is in effect. Because the tax burden is not evenly distributed, the plaintiff herein and other non-exempt producers of domestic taxable crude oil must bear a disproportionate amount of the $227.3 billion tax burden created by the Act.

16. The legislative history of the Act demonstrates that the proper remedy for this unconstitutional situation is invalidation of the tax. Extension of the tax to those areas of Alaska not covered by the tax would significantly interfere with the announced goals of energy independence and increased petroleum availability.

17. As clearly appears from its legislative history, the Act was enacted for the stated purposes of reducing the dependence of the United States of America on foreign oil and encouraging domestic production of oil. In reality the Act will have the opposite effect and will increase the depend-

ence of the United states of America on foreign oil and will actually decrease domestic production of oil.

18. Although the purpose of the Act as appears from its legislative history may be reasonable, its application and effect are wholly unreasonable and unlawful. The Act, therefore, violates the due process clause of Amendment V of the United States Constitution.

19. Because there is no rational relationship between said purposes of the Act and the actual application and effect of the Act, it violates the due process clause of Amendment V of the United States Constitution.

20. There is no rational basis for distinguishing between the domestic taxable crude oil subject to the tax and property other than such domestic taxable crude oil. The Act results in an unwarranted discrimination against those owners and producers of domestic taxable crude oil who are subject to the tax, including plaintiff, and thus it violates the plaintiff's right of due process.

21. The tax cannot be justified as an attempt to reclaim high prices caused by the actions of members of the Organization of Petroleum Exporting Countries (OPEC) because the tax only increases the power of OPEC by decreasing domestic production of crude oil. The means and effect of the Act are not reasonably related to the purposes for which it was enacted, namely, increasing the energy independence of the United States of America. Therefore, the Act violates plaintiff's right of due process of law guaranteed by Amendment V to the United States Constitution.

22. The tax imposed by the Act has resulted in the taking of the property of plaintiff for public use without just compensation contrary to the United States Constitution, Amendment V, which prohibits the taking of private property for public use without just compensation.

23. The total number of persons and entities who are not exempt from imposition of the tax consists of approximately 12,000 producers and 2-½ million royalty owners which number comprises approximately one percent of the population of the United States of America. The United States Constitution, Amendment V, guarantees the political protection of minorities from the tyranny of the majority. It

prevents the arbitrary seizure of the property of minorities to serve the purposes of the majority.

24. The persons paying the tax under the Act are not compensated for the taking of their property either in a concrete form, or by sharing equally in the benefits of the tax. The burden of the tax falls heavily upon a small minority while the benefits of the tax are directed toward other segments of society (Section 102 of the Act).

25. The property of said minority is taken under the Act for the benefit of the majority, in total disregard of the political protections inherent in the concept of private property.

26. The discriminatory seizure of the private property of minorities for the benefit of the majority is exactly the evil that the United States Constitution sought to prohibit when it forbade the taking of private property for public use without just compensation. The Act directly contravenes this constitutional principle and thus should be declared unconstitutional.

27. The ultimate effect of the Act undermines the purported objective of achieving energy independence by the United States of America. Such ultimate effect imposes harm upon the American consumer and interferes with the private property protections necessary for the preservation of a free society.

WHEREFORE, plaintiff respectfully prays and requests:

1. That this Court adjudge, declare and decree that the Act is unconstitutional.

2. That this Court grant plaintiff such other and further relief as may be just and proper in the premises.

**COUNT TWO**
**Count Seeking Refund of Excise Taxes**
**Illegally Assessed and Collected**

28. Plaintiff refers to and by this reference adopts and realleges all of the allegations contained in Count One, and like effect as if fully repeated at length herein.

29. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1346(a)(1).

30. Taxpayer plaintiff seeks to obtain a refund of all excise taxes illegally assessed and collected under the Act where his refund claims have been rejected or have been filed more than six months with the Internal Revenue Service without action.

WHEREFORE, plaintiff respectfully prays and requests:

1. That this Court adjudge that the excise tax under the Act was erroneously and improperly assessed by the defendant and collected from the plaintiff.

2. That this Court enter an order directing and commanding the defendant to refund to plaintiff all payments, with interest, illegally and improperly assessed by defendant and paid by plaintiff under the Act.

3. That this Court enter an order directing and commanding defendant to take no further action which would result in the assessment and collection of this special excise tax on the domestic taxable crude oil of domestic oil producers under the Act.

4. That this Court grant plaintiff such other and further relief as may be just and proper.

This Complaint is dated this ____ day of February, 1982.

OF COUNSEL:

Stephen F. Williams
Robert F. Nagel
Professors of Law
University of Colorado
School of Law
Campus Box 410
Boulder, CO 80309

HAROLD B. SCOGGINS, JR
Independent Petroleum
Association of America
1101 16th Street, N.W.
Washington, D.C. 20036
(202) 957-4731

and

BROWN, DREW, APOSTOLOS,
MASSEY & SULLIVAN
500 Petroleum Building
Casper, WY 82601

By____________________
WM. H. BROWN

and

/s/ ____________________
MICHAEL J. SULLIVAN

Form 843
(Rev. June 1976)
Department of the Treasury
Internal Revenue Service

# Claim

**If your claim is for an overpayment of income taxes, do NOT use this form (see instructions)**

Name of taxpayer or purchaser of stamps
JOHN PARTRIDGE, JR.

Number and street
BOX 2134

City or town, State, and ZIP code
CASPER, WYOMING 82602

**Fill in applicable items—Use attachments if necessary**

1 Your social security number
567-09-3575

2 Employer identification number
N/A

3 Internal Revenue Service office where return (if any) was filed
OGDEN, UTAH

4 Name and address shown on return, if different from above
SAME

5 Period—prepare separate form for each taxable period
From 2/29 , 19 80 to 9/30 , 19 80

6 Amount to be refunded or abated
$1135.20

7 Dates of payment
VARIOUS DATES DURING ABOVE PERIOD

8 Type of tax
☐ Employment ☐ Estate ☐ Excise ☐ Gift ☐ Stamp WINDFALL PROFITS

9 Kind of return filed
☐ 706 ☐ 709 ☐ 720 ☐ 940 ☐ 941 ☐ 990-PF ☐ 4720 ☒ Other (specify) ▶ WINDFAL PROFIT

10 Explain why you believe this claim should be allowed and show computation of tax refund or abatement.

See attached explanation, Form Claim Item 10, 843

Under penalties of perjury, I declare that I have examined this claim, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete.

Signed John P. Partridge Jr. Dated [illegible] 1980

Director's Stamp
(Date received)

For Internal Revenue Service Use Only
☐ Refund of taxes illegally, erroneously, or excessively collected.
☐ Refund of amount paid for stamps unused, or used in error or excess.
☐ Abatement of tax assessed (not applicable to estate or gift taxes).

See instructions on back.

EXHIBIT ●

Form 843 (Rev. 6-76)

## CLAIM

### Item 10, Form 843

The taxpayer seeks a refund of all taxes paid by him pursuant to the Crude Oil Windfall Profit Tax, as set forth in Chapter 45 of the Internal Revenue Code, imposed by Public Law 96-223 on producers of certain domestic crude oil.

The taxpayer has paid the tax for which refund is sought, which is imposed by section 4986 of the Internal Revenue Code, and which is withheld and paid under section 4995.

The statute is unconstitutional in its entirety. In particular, the Windfall Profit Tax is unconstitutional in the following respects:

1. It constitutes a taking of private property without just compensation, in violation of the Fifth Amendment to the United States Constitution.
2. It establishes an unwarranted and irrational discrimination between the taxation of oil and of all other forms of income, in violation of the due process clause of the Fifth Amendment to the United States Constitution.
3. It is an arbitrary and irrational tax utterly unable to advance the purposes which it allegedly serves, in violation of the Fifth Amendment to the United States Constitution.
4. If in fact it is an excise tax, it is an unconstitutional excise tax as it is not uniform throughout the United States, as required by Article 1, Section 8, Clause 1, of the United States Constitution.

The tax, in its entirety, is unconstitutional. Therefore, all amounts collected from the taxpayer, together with interest thereon from the date of collection, should be refunded.

NOTE: The listing of constitutional challenges in this claim for refund should not be viewed as waiving any procedural, computational or other grounds for refund.

DEPARTMENT OF THE TREASURY
Internal Revenue Service
OGDEN, UT 84201

In reply refer to: 29740125
Dec. 03, 1980 LTR 105C 8222 567-09-3575

Michel J Sullivan & William H Brown WP2237R
Brown Drew Apostolos Massey & Sullivan
500 Protroleum Bldg
Casper, WY 82601

Social Security Number: 567-09-3575
Kind of Tax: Windfall profit
Amount of Claim: $1,135.30
Date Claim Received: Nov. 3, 1980

Dear Taxpayers:

We are sorry, but we cannot allow your claim for an adjustment to your tax for the period ended Sept. 30, 1980. This letter is your legal notice that your claim is fully disallowed.

We have disallowed the claim because the claim is based on your view that certain tax laws are unconstitutional, only the courts have authority to pass on such matters.

Reference John Partridge Junior

If you wish to bring suit or proceedings for the recovery of any tax, penalties or other moneys for which this disallowance notice is issued, you may do so by filing such a suit with the United States District Court having jurisdiction, or the United States Court of Claims. The law permits you to do this within 2 years from the mailing date of this letter. However, if you signed a waiver of the notice of disallowance (Form 2297), the period for bringing suit began to run on the date the waiver was filed.

**EXHIBIT B**

EXHIBIT C

Form 843
(Rev. June 1976)
Department of the Treasury
Internal Revenue Service

# Claim

If your claim is for an overpayment of income taxes, do NOT use this form (see instructions)

Name of taxpayer or purchaser of stamps
John F. Partridge

Number and street
P. O. Box [illegible]

City or town, State, and ZIP code
Casper, Wyoming 82601

Fill in applicable items—Use attachments if necessary

1 Your social security number: 567-09-3575

2 Employer identification number: N/A

3 Internal Revenue Service office where return (if any) was filed
Ogden, Utah 84201

4 Name and address shown on return, if different from above
John F. Partridge & Wilma J. Partridge - address same

5 Period—prepare separate form for each taxable period
From February 29, 19 80, to December 31, 19 80

6 Amount to be refunded or abated
$ 3,468.32*

7 Dates of payment
Various dates during 1980.

8 Type of tax
☐ Employment ☐ Estate ☒ Excise ☐ Gift ☐ Stamp Windfall Profit

9 Kind of return filed
☐ 706 ☐ 709 ☐ 720 ☐ 940 ☐ 941 ☐ 990-PF ☐ 4720 ☒ Other (specify) Windfall Profit

10 Explain why you believe this claim should be allowed and show computation of tax refund or abatement.

See attached explanation

*Total 1980 windfall tax paid as shown on Forms 6248 attached less claim for overpayment as claimed on Form 6249 attached.

Under penalties of perjury, I declare that I have examined this claim, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete.

Signed John F. Partridge Dated June 22 19 81

Director's Stamp (Date received)

For Internal Revenue Service Use Only
☐ Refund of taxes illegally, erroneously, or excessively collected.
☐ Refund of amount paid for stamps unused, or used in error or excess.
☐ Abatement of tax assessed (not applicable to estate or gift taxes)

See instructions on back. Form 843 (Rev. 6-76)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

Civil NO. C82-0050

JOHN PARTRIDGE, PLAINTIFF,

*v.*

UNITED STATES OF AMERICA, DEFENDANT.

## ANSWER

Comes now the defendant, United States of America, by and through its counsel of record, Richard A. Stacy, United States Attorney for the District of Wyoming, Robert L. Baker, Trial Attorney, Tax Division, Department of Justice, and for its answer to the Plaintiff's Complaint responds as follows:

Denies each and every allegation of such complaint not admitted, qualified or otherwise specifically referred to below.

Further answering, defendant says that it:

## COUNT ONE

1. Admits the allegations set forth in the first two sentences of paragraph 1 of plaintiff's complaint, but denies any averments that may be contained in the remaining allegations in paragraph 1.

2. Denies the allegations contained in paragraph 2 of plaintiff's complaint.

3. Admits the allegations contained in paragraph 3 of plaintiff's complaint.

4. Admits that plaintiff is a citizen of the State of Wyoming and is an independent oil producer; that on October 27, 1980, Plaintiff filed a claim for refund (Form 843) with the Internal Revenue Service which was disallowed; that on June 25, 1981, plaintiff filed a second claim for refund which has not been disallowed; that defendant lacks information or knowledge sufficient to form a belief as to the remaining allegations contained in paragraph 4 of plaintiff's complaint, and, therefore, denies them.

5. Lacks information or knowledge sufficient to form a belief as to the allegations contained in paragraph 5 of plaintiff's complaint, and, therefore, denies them.

6. Admits the allegations contained in paragraph 6 of plaintiff's complaint.

7. Denies any averments that may be contained in paragraph 7 of plaintiff's complaint, and further states that the said Act speaks for itself as to meaning and content.

8. Admits the allegations contained in paragraph 8 of plaintiff's complaint.

9. Denies the allegations contained in paragraph 9 of plaintiff's complaint and further states that the terms of the exemption speak for themselves as to meaning and content.

10. Admits the allegations contained in paragraph 10 of plaintiff's complaint.

11. Denies any averments that may be contained in paragraph 11 of plaintiff's complaint and further states that the Constitution speaks for itself as to meaning and content.

12. Denies any averments that may be contained in paragraph 12 of plaintiff's complaint.

13. Denies the allegations contained in paragraph 13 of plaintiff's complaint.

14. Denies the allegations contained in paragraph 14 of plaintiff's complaint.

15. Denies the allegations contained in paragraph 15 of plaintiff's complaint.

16. Denies the allegations contained in paragraph 16 of plaintiff's complaint.

17. Denies the allegations contained in paragraph 17 of plaintiff's complaint.

18. Denies the allegations contained in paragraph 18 of plaintiff's complaint.

19. Denies the allegations contained in paragraph 19 of plaintiff's complaint.

20. Denies the allegations contained in paragraph 20 of plaintiff's complaint.

21. Denies the allegations contained in paragraph 21 of plaintiff's complaint.

22. Denies the allegations contained in paragraph 22 of plaintiff's complaint.

23. Lacks information or knowledge sufficient to form a belief as to the allegations contained in the first sentence of paragraph 23 of plaintiff's complaint, and, therefore, denies them; and further states with respect to the balance of paragraph 23, that the Constitution speaks for itself as to meaning and content.

24. Denies the allegations contained in paragraph 24 of plaintiff's complaint.

25. Denies the allegations contained in paragraph 25 of plaintiff's complaint.

26. Denies the allegations contained in paragraph 26 of plaintiff's complaint.

27. Denies the allegations contained in paragraph 27 of plaintiff's complaint.

## COUNT II

28. Defendant incorporates by reference its responses to the allegations contained in Count One of plaintiff's complaint.

29. Denies the allegations contained in paragraph 29 of plaintiff's complaint.

30. Admits the allegations contained in paragraph 30 of plaintiff's complaint except denies that the excise taxes assessed under the Act were illegally assessed or collected.

## ADDITIONAL DEFENSE

The defendant further alleges that the Court has no jurisdiction to render a declaratory judgment with respect to federal taxes, (See 28 U.S.C. Sec. 2201) or to enjoin the assessment or collection of taxes (See 26 U.S.C. Sec. 7421) as requested by plaintiffs in the complaint.

**WHEREFORE, the defendant, United States of America, having answered plaintiff's complaint, prays that judgment be entered in favor of the United States of America, that plaintiff's complaint be dismissed with prejudice and that this Court grant such other and additional relief as it deems proper.**

**RICHARD A. STACY**
***United States Attorney***

---

**/s/ ROBERT L. BAKER**
***Trial Attorney***
***Tax Division***
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

No. C80-0302

INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, AMERICAN ASSOCIATION OF PETROLEUM LANDMEN, ASSOCIATION OF OILWELL SERVICING CONTRACTORS, EASTERN KANSAS OIL AND GAS ASSOCIATION, LIAISON COMMITTEE OF COOPERATING OIL AND GAS ASSOCIATIONS, ARKOMA BASIN INDEPENDENT GAS PRODUCERS ASSOCIATION, CALIFORNIA INDEPENDENT PRODUCERS ASSOCIATION, ILLINOIS OIL AND GAS ASSOCIATION, INDIANA OIL AND GAS ASSOCIATION, INDEPENDENT OIL AND GAS ASSOCIATION OF WEST VIRGINIA, INDEPENDENT PETROLEUM ASSOCIATION OF MOUNTAIN STATES, KANSAS INDEPENDENT OIL AND GAS ASSOCIATION, LOUISIANA LANDOWNERS ASSOCIATION, INC., MICHIGAN OIL AND GAS ASSOCIATION, NEW YORK STATE OIL PRODUCERS ASSOCIATION, INDEPENDENT OIL PRODUCERS TRI-STATE, INC., INDEPENDENT PETROLEUM ASSOCIATION OF NEW MEXICO, KENTUCKY OIL AND GAS ASSOCIATION, LOUISIANA ASSOCIATION OF INDEPENDENT PRODUCERS AND ROYALTY OWNERS, NATIONAL STRIPPER WELL ASSOCIATION NORTH TEXAS OIL AND GAS ASSOCIATION, OHIO OIL AND GAS ASSOCIATION, PANHANDLE PRODUCERS AND ROYALTY OWNERS ASSOCIATION, PENNSYLVANIA OIL AND GAS ASSOCIATION, TENNESSEE OIL AND GAS ASSOCIATION, VIRGINIA OIL AND GAS ASSOCIATION, OKLAHOMA INDEPENDENT PETROLEUM ASSOCIATION, PENNSYLVANIA GRADE CRUDE OIL ASSOCIATION, PERMIAM BASIN PETROLEUM ASSOCIATION, TEXAS INDEPENDENT PRODUCERS AND ROYALTY OWNERS ASSOCIATION, WEST CENTRAL TEXAS OIL AND GAS ASSOCIATION, HARRY PTASYNSKI, JOHN PARTRIDE, BERTON W. AVERY, GOLDIE AVERY, FREDERICK S. JOHNSON, AND CALVIN PETROLEUM CORPORATION, PLAINTIFFS,

*v.*

UNITED STATES OF AMERICA, DEFENDANT.

No. C82-0050

JOHN PARTRIDGE, PLAINTIFF

*v.*

UNITED STATES OF AMERICA, DEFENDANT.

## ORDER CONSOLIDATING ACTIONS

Upon consent of the parties and for good cause shown; NOW, THEREFORE, IT IS

ORDERED that the above-entitled actions be and the same are hereby consolidated for trial pursuant to the provisions of Rule 42 of the Federal Rules of Civil Procedure.

Dated this 10th day of June, 1982.

/s/ ______________________________

EWING T. KERR
*U.S. District Judge*

# Supreme Court of the United States

No. 82–1066

UNITED STATES OF AMERICA, APPELLANT

*v.*

HARRY PTASYNSKI, ET AL.

APPEAL from the United States District Court for the District of Wyoming.

The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted.

February 22, 1983

No. 82-1066

IN THE
# Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, *Appellant*,

v.

HARRY PTASYNSKI, *et al.*, *Appellees*.

**On Appeal From The United States District Court For The District Of Wyoming**

# MOTION OF TAXPAYER AND ASSOCIATION APPELLEES TO AFFIRM

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## QUESTIONS PRESENTED

1. Whether an excise tax on domestic crude oil, which is specifically framed to apply throughout the United States except to geographically defined areas of Alaska, violates the Uniformity Clause (Article I, Section 8, Clause 1) of the Constitution, which requires that "Excises shall be uniform throughout the United States." Art. I, § 8, Cl. 1.

2. Assuming the tax to be unconstitutional, whether the proper remedy is to sever the invalid tax in its entirety from the Internal Revenue Code so that Congress can frame new and uniform legislation of its own design or whether, as the defendant contends, this Court should itself rewrite the tax to extend it to the Congressionally exempted areas of Alaska.*

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*Although no such listing is required in the responsive motion, it is noted that the names of all parties in the Court whose judgment is being sought to be reviewed are set forth in the caption of the District Court opinion (J.S., 1a). None of the corporate parties has a parent company, subsidiary (other than a wholly-owned subsidiary) or affiliate.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

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No. 82-1066

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UNITED STATES OF AMERICA, *Appellant*,

v.

HARRY PTASYNSKI, *et al.*, *Appellees*.

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**On Appeal From The United States District Court For The District Of Wyoming**

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## MOTION OF TAXPAYER AND ASSOCIATION APPELLEES TO AFFIRM

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Taxpayer and Association appellees, pursuant to Rule 16 of the Rules of the Supreme Court, move that the final judgment of the District Court be summarily affirmed. The questions presented by the Government are so insubstantial as not to need further argument; summary affirmance will promptly provide a clear legal basis for planning by Congress and taxpayers alike.

### STATEMENT

**I. The Tax And The Alaska Exemption**

The Government's Jurisdictional Statement (J.S., 2-5) adequately describes the general features of the tax imposed by Title I of the Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223, 94 Stat. 229 (hereinafter referred to as the "Tax" or the "Windfall Profit Tax"). Its basic structure is succinctly depicted in the chart contained in the District Court's opinion. 550 F. Supp. 549 (reprinted at J.S., App. A, 3a).

The tax is specifically identified by Congress as an excise tax. See 26 U.S.C. Section 4986(a). It is levied, at rates ranging as high as 70%, on "windfall profits" (as defined in a technical statutory formula) from production of oil in 49 states and parts of Alaska. However, contrary to the Constitution, the Tax is *not* "uniform throughout the United States." Art. I, § 8, cl. 1.

The Act provides an exemption for oil produced in an area constituting approximately three-fourths of the State of Alaska.[1] Although the Act contains several exemptions, the Alaska exemption is the only one based upon the geographic location where the oil is produced.[2] "Exempt Alaskan oil" is defined as certain oil produced

(1) from a reservoir from which oil has been produced in commercial quantities through a well located north of the Arctic Circle, or

(2) from a well located on the northerly side of the divide of the Alaska-Aleutian Range and at least 75 miles from the nearest point on the Trans-Alaska Pipeline System.

Section 4994(e).[3] Crude oil produced from that part of the Sadlerochit reservoir located in the Prudhoe Bay oil field is, however, excluded from the exemption. Sections 4994(e), 4996(d)(3).

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[1] *See* map at App. A. While Defendant repeatedly refers to the exemption as an "Arctic" exemption or "North Slope" exemption and strongly implies that only the area north of the Arctic Circle (approximately ¼ the total area of Alaska) is exempt, the area of the exemption encompasses about ¾ of the State of Alaska, including most of the area below the Arctic Circle.

[2] The governmental, charitable and Indian exemptions are based upon the identity of the owners of the production. See Sections 4994(a), (b) and (d). The "front-end tertiary oil" exemption is based on the producer's use of the proceeds to finance expensive tertiary production. See Section 4994(c).

[3] The Technical Corrections Act of 1982, Pub. L. No. 97-448, 96 Stat. 2365, makes certain technical clarifying amendments in the

The scope of the exemption is vast—not only in area but also in potential oil production sheltered from tax. Official reports of the United States Geological Survey estimate that by 1986 production from *a single field* in the exempt region (the Kuparuk River field) will equal 250,000 barrels of oil per day. 1982 Annual Report on Alaska's Mineral Resources, Geological Survey Circular 884 (1982). If that field were a separate state, such production would entitle it to rank seventh among the oil-producing states, behind only Texas, Louisiana, Oklahoma, California, Wyoming and the non-exempt portions of Alaska. The proven reserves of the Kuparuk River field, however, equal only seven percent of the estimated potential reserves attributable to the exempt area.[4]

Without the Alaska exemption, the Windfall Profit Tax could not have obtained Congressional approval in anything remotely resembling its present form. *All* the seriously considered bills in one form or another exempted Alaskan oil. President Carter's proposal (H.R. 3919, 96th Cong., 1st Sess., § 2) and the House and Senate bills all expressly exempted substantial areas of Alaska. The Senate Finance Committee bill exempted all newly discovered oil. See S. Rep. 394, 96th Cong., 1st Sess. 42-43 (1979), *reprinted at* 1980 U.S. Code and Ad. News 410, 452-53.[5] Not only did every serious proposal

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language of the exemption, none of which is relevant to this appeal. The amended Section 4994(e) is set forth in App. B, *infra*.

[4] Estimated undiscovered reserves in the exempt area are 17.2 billion barrels, which is 21% of such reserves for the entire United States. Proven reserves in the exempt area are 8.5 billion barrels, of which 17.6% or 1.5 billion barrels are in the Kuparuk River field. Geological Survey Circular 860, U.S.G.S. (1982).

[5] This exemption effectively sheltered from tax all Alaskan production covered by the ultimately adopted Alaska exemption, and then some. This is so because the only Alaskan oil failing to qualify for the Committee's newly discovered oil exemption was Sadlerochit oil in Prudhoe Bay (which was denied exemption in the final act, see Sections 4994(e), 4996(d)(3)).

effectively exempt Alaskan oil, but the adoption by the Senate of an explicit Alaskan exemption was critical both to the Senate's decision to extend the tax to newly discovered oil and to its resolution of the stalemate in which the tax bill had become trapped.[6]

**II. Proceedings Below**

Taxpayer appellees[7] brought suit seeking refunds of Windfall Profit Taxes paid on the grounds that the Tax is unconstitutional in violation of both the Uniformity Clause (Article I, Section 8, Clause 1) and the Fifth Amendment prohibitions against taking of property without due process of law and against the taking of property for a public use without just compensation.[8]

The association appellees[9] also joined as plaintiffs below. The largest of these associations is the Independent Petroleum Association of America (IPAA), a national organization of independent domestic oil producers who are subject to the Tax. The remaining 30 associations are national, state or regional associations of producers of crude oil or owners of royalty interests in crude oil. These organizations, together with the IPAA, represent essentially all of the 12,000 independent producers of crude oil and natural gas in the United States, together with several thousand royalty owners. The combined membership of the associations account for approximately 90% of the wildcat exploratory drilling in the United States, drill 80% of all wells in the United States, and have discovered more

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[6] See *infra* at 25-27.

[7] Harry Ptasynski, John Partridge, Berton W. Avery, Goldie Avery, Frederick S. Johnson, and Calvin Petroleum Corporation.

[8] A later suit filed by taxpayer appellee Partridge, covering taxes paid through the year 1980, was consolidated with the principal action. See J.S., App. A, 2a.

[9] The 30 associations are listed in the caption of the District Court's decision (J.S., App. A, 1a).

than 50% of the known crude oil and natural gas reserves in the United States. See Second Amended and Supplemental Complaint at paras. 4-5. The District Court found the association appellees to lack standing as plaintiffs, but ordered that they should remain as permissive intervenors.[10]

By its opinion and judgment of November 4, 1982, as amended, the District Court awarded refunds to the taxpayer appellees on the grounds that the Tax violated the Uniformity Clause. It held (J.S., App. A, 7a) that

> in each state where crude oil is found, the production and removal of that crude oil be subject to the tax and taxed at the same rate. The windfall profits tax ignores this requirement. The Act, on its face, says that one state, Alaska, is not subject to the same tax, at the same rate as all the other states. This is a clear violation of the constitutional requirement of uniformity.

The District Court then determined that the remedy must be an invalidation of Title I of the Crude Oil Windfall Profit Tax Act of 1980. Thus it rejected the Government's suggestion that it treat the Alaska exemption as "separable" and extend the Tax to the exempt portions of Alaska.[11] Recognizing that the separability issue turned on legislative intent, the District Court found (J.S., App. A, 9a) that it was "clear that the Alaska exemption was the result of negotiations and compromise, and that the Act as it exists today would not have been passed without the invalid Alaska provision."

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[10] In addition, the District Court granted motions to intervene by the States of Louisiana and Texas. See J.S., App. A, 2a.

[11] It also implicitly rejected the Government's alternative proposal that the court extend the exemption "to production in all areas similar to the Arctic Circle or located more than 75 miles from a pipeline connection." See Reply Brief for the Defendant United States of America and in Opposition to Motions for Summary Judgment, at 10.

## ARGUMENT

The Windfall Profit Tax clearly violates the Uniformity Clause. In an unbroken line of cases dating from 1796 to the present, this Court has interpreted the Clause to require *geographic* uniformity. See *Hylton* v. *United States*, 3 U.S. (3 Dall.) 171, 180 (1796). In its classic formulation, the Court said that a tax complied with the Uniformity Clause only if "it operates with the same force and effect in every place where the subject of it is found." *Head Money Cases*, 112 U.S. 580, 594 (1884).[12] The Windfall Profit Tax is an excise tax covered by the Uniformity Clause, see Section 4986(a), and the Alaska exemption is geographically defined. The Government expressly concedes both points. J.S., 3, 17. Accordingly, the District Court's conclusion that the Tax "ignores [the uniformity] requirement" is inescapable. There is no need for elaborate briefing and oral argument on the Government's proposals that the Court now abandon a constitutional understanding that has served the country well for nearly 200 years.

Equally inescapable is the District Court's finding that "the Act as it exists today would not have been passed without the invalid Alaska provision." Every seriously considered bill either expressly, or by exemption of newly discovered oil, excluded much or all of the oil covered by the present exemption. The Alaska exemption was an integral part of the Congressional decision to extend the Tax to newly discovered oil. Persistent and effective Senate opposition to that extension gave way only when vehemently opposed Senate factions agreed on a package that included the Alaska exemption. The Government's suggestions that this Court rewrite the Tax—either by extending its burdens to Alaska or by judicially

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[12] Only last term this Court held that the cognate requirement in the Bankruptcy Clause must not be watered down to a vague requirement of rationality. See *Railway Labor Executives Ass'n* v. *Gibbons*, 102 S. Ct. 1169, 1177 n. 11 (1982). The Government's effort to save the Tax requires the adoption of precisely such a "rational basis" test. See J.S., 17.

exempting newly discovered oil (see J.S., 26 n. 32)—are simply invitations to judicial legislation. There being no way of predicting exactly what adjustments Congress will make to conform the Tax to constitutional necessity, the conventional and appropriate remedy is to invalidate the Tax and to leave to Congress the policy judgments required for a cure.

### I. The Alaska Exemption Violates the Uniformity Clause.

Article 1, Section 8, Clause 1 of the Constitution provides:

> The Congress shall have power to lay and collect Taxes, Duties, Imposts, and *Excises* . . . ; but all Duties, Imposts and Excises *shall be uniform throughout the United States*. (Emphasis added.)

The Windfall Profit Tax is an excise tax. See Section 4986(a). It is not geographically uniform throughout the United States. It is therefore invalid under the language of the Clause and an unbroken line of decisions by this Court.

#### A. This Court Has Consistently Interpreted the Uniformity Clause To Prohibit Purely Geographic Classificiations.

This Court has never deviated from the principle that the Uniformity Clause prohibits Congress from drawing tax classifications purely on the basis of geographic *location*. The Court has distinguished between geographic uniformity and "intrinsic" uniformity, *i.e.*, an identical *impact* on all sections of the country (as would be true only when the subject of taxation existed in equal proportions in all regions). While repeatedly rejecting claims that the Clause requires intrinsic uniformity, the Court has with equal regularity asserted its insistence on geographic uniformity.

The Court first interpreted the uniformity provision shortly after adoption of the Constitution. In *Hylton* v. *United States*, 3 U.S. (3 Dall.) 171 (1796), Justice Paterson[13] considered the

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[13] William Paterson had served as a delegate to the Constitutional Convention from New Jersey.

Clause and explained the Court's preference for classifying taxes so that they would be covered by the requirement of uniformity rather than that of apportionment.[14] He emphasized that, in contrast to the "endless valuations and assessments" necessary for apportionment,

> The rule of uniformity . . . implies certainty . . . The truth is, that *the articles taxed in one state should be taxed in another;* in this way the spirit of jealousy is appeased, and tranquility preserved; *in this way the pressure on industry will be equal in the several states*, and the relation between the different subjects of taxation duly preserved.

3 U.S. (3 Dall.) at 180 (emphasis added).

In the *Head Money Cases*, 112 U.S. 580 (1884), the Court clarified the proposition that the Uniformity Clause did not permit Congress to allocate the burden of taxes by reference to geographic boundaries. A tax, it said, complies with the Uniformity Clause only if "it operates with the same force and effect *in every place* where the subject of it is found." 112 U.S. at 594 (emphasis added).

In the Court's most complete discussion of the clause, *Knowlton* v. *Moore*, 178 U.S. 41 (1900), it again concluded that the Clause refers "purely to a geographical uniformity." 178 U.S. at 96. In its words, the Uniformity Clause requires

> that whatever plan or method Congress adopts for laying the tax in question, the same plan and the same method must be made operative throughout the United States; that is to say, that *wherever a subject is taxed anywhere, the same must be taxed everywhere throughout the United States, and at the same rate.*

*Id.* at 84 (emphasis added).

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[14] The taxpayer there claimed that a tax on carriages was "direct" and ought therefore to have been apportioned pursuant to Article I, Section 9, Clause 4. Instead the Court held the tax to be indirect and governed by the uniformity requirement of Article I, Section 8, Clause 1.

In subsequent cases, the Supreme Court has consistently held that the uniformity required is geographic uniformity. In *Florida* v. *Mellon*, 273 U.S. 12, 17 (1927), the Court stated that the Uniformity Clause requires "that the law shall be uniform in the sense that by its provisions the rule of liability shall be alike *in all parts* of the United States" (emphasis added), and in *LaBelle Iron Works* v. *United States*, 256 U.S. 377, 392 (1921), the court construed the Clause as requiring "territorial" uniformity. See also *Fernandez* v. *Wiener*, 326 U.S. 340 (1945).

The Windfall Profit Tax does not apply "everywhere throughout the United States." It thus violates the simple, straightforward requirement of geographic uniformity.

**B. There is no support for the Government's contention that geographically discriminatory taxes are "uniform" if the non-uniformity has a "rational basis."**

The Government persistently argues that geographic discriminations comply with the Uniformity Clause if they are supported by a "rational basis." J.S., 13-20 and especially 17. In the past term, however, this Court emphatically rejected a contention that would similarly have diluted the parallel uniformity requirement imposed on bankruptcy legislation by Article I, Section 8, Clause 4. *Railway Labor Executives Ass'n* v. *Gibbons*, 102 S. Ct. 1169 (1982). In the words of the Court, "the uniformity requirement of the Bankruptcy Clause is not an Equal Protection Clause for bankrupts." *Id.* at 1177 n.11.[15]

By the same token, nothing in the Court's treatment of the uniformity requirement of the Tax Clause suggests that it is merely an Equal Protection Clause for taxpayers.

The Government relies heavily on the fact that in the *Head Money Cases*, 112 U.S. 580 (1884), the Court upheld the challenged tax, which Congress had levied on alien passengers

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[15] The "rational basis" test proposed by the Government appears to be the test by which courts evaluate economic legislation for purposes of the Equal Protection Clause.

entering the United States by vessel. The Government notes that such a tax "could apply only in states having sea ports (a matter necessarily determined by considerations of their geography)." J.S., 16. But appellees have never questioned Congressional power to use tax classifications that have different consequences for different localities. Every term that Congress might use—oil, vessels, port, cold weather, etc.—would affect different regions in different ways. The *Head Money Cases*, and later Court decisions, clearly hold that the Uniformity Clause does not require "intrinsic uniformity." See the *Head Money Cases*, 112 U.S. at 594-95; *Knowlton* v. *Moore*, 178 U.S. 41, 84-109 (1900). Accordingly, if Congress should enact a provision exempting oil produced where specified climatic conditions are present, and if such conditions should exist in only one or in only a few states, there might be no successful challenge under the Uniformity Clause. Here, however, Congress has spoken in terms of express geographic boundaries. This the Uniformity Clause forbids.

Despite the Constitutional validity of differences in the geographic impact of taxes, this Court's historic disapproval of geographic non-uniformity involves more than "mere niceties of Congressional draftsmanship." J.S., 20. The Constitution's demand that Congress draft its tax classifications without reliance on purely geographic categories means that Congress will at least consider the issues in terms of genuine policy considerations, rather than naked political power. If, for example, there is a genuine concern in Congress over the Tax's disincentive to oil production in adverse climates, then, after invalidation of the Tax, Congress may wish to provide general exemptions for oil produced in areas that experience specified climatic conditions. Any such "cold weather" exemption would, of course, be likely to benefit areas of states other than Alaska; Wyoming and other mountain states, for example, would be likely to benefit. Even if the advantages of a "cold weather" exemption happened to affect only portions of Alaska, however, treatment of the issue in that form would naturally draw Congress on to consider whether other factors

accounting for high costs—such as production from offshore wells or from great depths—should also enjoy special relief.

The utility of barring Congress from reliance on purely geographic categories is illustrated, in the present Tax, by the incongruous relation between the Alaska exemption and the Tax's other solutions to the problem of high-cost oil. For example, the Tax's general solution to the problem is the "net income" limitation. 26 U.S.C. Section 4988(b).[16] Pursuant to that limitation, high-cost production in every other state is protected only to the extent that its costs and revenues meet the statutory prerequisites; but production from the exempt three-fourths of Alaska enjoys a free ride irrespective of actual costs and revenues.[17]

Another typically high-cost category is newly discovered oil, which, outside of Alaska, is placed in a preferentially treated tier but is still subject to substantial tax. See 26 U.S.C. Section

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[16] Pursuant to Section 4988(b), when the "windfall profit" is greater than 90% of "net income," the appropriate tax rate is applied to 90% of "net income" rather than to the "windfall profit."

[17] The Government's effort to sustain the Alaskan exemption by reference to high transportation costs between Alaska and mainland United States markets (J.S., 18-19) is simply in error. Mainland purchasers will not pay any premium for Alaskan oil; thus its price at the wellhead must be lower, by the amount of transportation costs, than the wellhead price of similar oil in the continental United States. For example, if transportation costs are $8 per barrel, and the wellhead price on the mainland is $28, the wellhead price for Alaskan oil will be $20. Since the "removal price" is in essence the wellhead price, application of the Act's established formula ("removal price" minus "adjusted base price" equals "windfall profit") *automatically reduces the "windfall profit"* from Alaskan oil by $8, without the need for any additional protection. See H. Rep. No. 304, 96th Cong., 1st Sess. 30 (1979), *reprinted at* 1980 U.S. Code Cong. & Ad. News 587, 612-13, for a recognition of the point.

4991(e). Alaska's newly discovered oil, by contrast, enjoys a superpreference—total exemption.[18]

The Constitutional insistence upon geographic uniformity is not, of course, any guarantee that tax classifications will be shaped by sound policy judgments rather than by the realities of political power. However, by making the exercise of the grosser, more unthinking forms of regional power politics marginally less convenient, it increases the likelihood of Congressional focus on genuine policy concerns. There is no reason for the Court to abandon that insistence now. Indeed, as the following section of this motion to affirm further indicates, the origins of the Alaskan exemption indicate that it represents precisely the sort of power play that the framers sought to avoid.

### C. The Uniformity Clause is violated as much by statutes that *exempt* a geographic area in a single state as by ones that *tax* such an area.

The Government suggests that the Uniformity Clause is not violated unless " 'combinations' have drawn taxing legislation in such a way as to grant an 'undue preference' in favor of their own states or to impose an 'oppressive' discrimination against a minority." J.S., 17.[19] In fact, the origins of the Clause make

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[18] The Government's suggestion that the Alaskan exemption is just a convenient device for exempting newly discovered oil (J.S., 16-17) is completely without foundation and neatly obscures Alaska's superpreferential treatment.

[19] Insofar as the Government argues that the Clause prohibits only "undue preferences" and permits ones that are "due" or rationally sustainable, the argument is a rehash of its "rational basis" theory, discussed in part I.B. *supra*. Again, paraphrasing the pithy words of the Court in *Railway Labor Executives Ass'n* v. *Gibbons*, 102 S. Ct. 1169, 1177 n.11 (1982), the uniformity requirement of the Tax Clause is not an Equal Protection Clause for taxpayers.

The Government also appears to suggest that there is no violation of the Uniformity Clause because the "subject" of the tax is the enjoyment of a "windfall profit" by the owner of the economic interest

clear that the framers sought to prevent explicit regional discriminations of any sort—favorable or unfavorable. And this Court has so held.

In *Knowlton* v. *Moore*, 178 U.S. at 89-106, this Court reviewed the origins of the Clause. On August 15, 1787, Constitutional Convention delegates Carroll and Martin "expressed their apprehension . . . that, under the power of regulating trade, the general legislature might *favor* the ports of particular states . . . ." 178 U.S. at 103. They therefore moved the following proposition:

> 'The legislature of the United States shall not oblige vessels belonging to citizens thereof, or to foreigners, to enter or pay duties or imposts in any other State than in that to which they may be bound, or to clear out in any other than the State in which their cargoes may be laden on board; nor shall any privilege or immunity be granted to any vessel on entering or clearing out, *or paying duties or imposts in one State in preference to another.*'

5 *Elliot's Debates* 478, *quoted at* 178 U.S. at 103 (emphasis by the Court).

The proposed ban on preferences was referred to a committee, along with a suggested requirement of uniformity in duties and excises. The committee responded with a proposal that joined the language of preference and uniformity:

> 'nor shall any regulation of commerce or revenue *give preference to the ports of one State over those of another*, or oblige vessels bound to or from any State to enter, clear or pay duties, in another; and all *tonnage duties, imposts and excises*, laid by the legislature, *shall be uniform throughout the United States.*'

5 *Elliot's Debates* 483, *quoted at* 178 U.S. at 103-04 (emphasis by the Court.)

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in such oil. J.S., 17. The theory at which the Government hints would, if accepted, completely eliminate the uniformity requirement. Assuming, for example, that some owners of Florida orange groves are domiciled elsewhere, Congress would be free to levy an excise tax on production of Florida oranges.

Trivial additional changes occurred, and, evidently as a result of stylistic concerns, the port preference and the tax uniformity provisions were separated.[20] The Court concluded that the two provisions were aimed at exactly the same evil:

> It follows from the collocation of the two clauses that the prohibition as to preferences in regulations of commerce between ports and the uniformity as to duties, imposts and excises, though couched in different language, had absolutely the same significance.

178 U.S. at 104.

Thus the purpose of the Uniformity Clause, as well as of its forerunners in the constitutional deliberation, was to prevent Congress from making any explicitly regional differentiation, favorable or unfavorable, in its exercise of the tax power.

The Government purports to rely on an excerpt from Story's *Commentaries* for a completely ahistorical suggestion that the Clause merely limits majorities from imposing "oppressive" tax burdens on minorities (J.S., 13-14):

> The answer to the *** [uniformity requirement] may be given in a few words. It was to cut off all undue preferences of one state over another, in the regulation of subjects affecting their common interests. Unless duties, imposts and excises were uniform, the grossest and most oppressive inequalities vitally affecting the pursuits and employments of the people of different states might exist.

J. Story, *Commentaries on the Constitution of the United States*, § 957, at 673 (2d ed. 1851). In this passage, Justice Story seeks to *explain* the Uniformity Clause, not to *construe* it. Without the Uniformity Clause, he argues, "undue preferences" and "the grossest and most oppressive inequalities" might exist. In no way does he read the Clause as inviting the

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[20] The Uniformity Clause was attached as a qualification to the taxing power granted in Article I, Section 8, Clause 1, while the prohibition on preferences for any port remained with the prohibition on export duties, Article I, Section 9, Clause 5. See 178 U.S. at 104-5.

courts to review tax legislation for "oppression" or "undue" favoritism; he simply argues, as do appellees, that without the uniformity requirement the risk of such oppression is much increased.

There is, consistent with the framers' thinking, a fundamental identity between (1) regional preferences and (2) oppression. Where a majority of states seek to embark on an oppressive course by enacting taxes on a commodity produced in only a portion of the country, a regional preference may help further the majority's oppressive goal. By exempting a particular state, the majority can diffuse political opposition in that region. By denying such devices to Congress, the framers deliberately threw a roadblock in the way of biased taxing efforts.

Indeed, the Alaska exemption played just such a role in the formulation of the Windfall Profit Tax itself. When the Senate extended the tax to newly discovered oil—thus increasing its adverse effects on all oil-producing states—it simultaneously exempted Alaskan oil produced in all but a small area of Alaska. See 125 Cong. Rec. S18567 (daily ed. Dec. 14, 1979). The exemption was essential in obtaining the critical support of Senator Stevens of Alaska, the Acting Minority Leader, for the inclusion of new oil. See 125 Cong. Rec. S18564-65 (daily ed. Dec. 14, 1979).[21]

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[21] See Section II.C. *infra* for more details of the legislative trades.

The lopsided impact of the Tax reveals the advantage obtained by the non-producing states when they neutralized the previously intense Alaskan opposition. Oil production in just five states—Texas, Louisiana, California, Oklahoma and Wyoming—must bear approximately 60-65% of the total Windfall Profit Tax burden. The remaining 35-40% is spread over 28 other producing states with no one state's production bearing more than 3% and 17 states having no tax burden at all. Thus adoption of the Tax demonstrates the framers' wisdom in seeking to thwart majoritarian oppression by means of a prohibition against any geographic non-uniformity.

The origins of the Uniformity Clause, the observations of commentators such as Story, and a common sense appreciation of the risks of geographic non-uniformity all argue against the Government's proposed limitation on the Clause. This Court has never countenanced such a view; its frequently reiterated view that the Clause forbids geographic non-uniformity is not consistent with such a narrow construction. There is no basis for so limiting the Clause.[22]

**D. Summary**

As the Government notes (J.S., 13), no taxing statute has been held invalid on the grounds of violation of the Uniformity

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[22] The Government re-asserts in a footnote (J.S., 20 n.28) a vestige of the surprising ripeness argument that it made in the District Court but has evidently dropped here. In its present form the assertion is that there is no breach of the uniformity requirement because there was no production in the exempt areas of Alaska in the periods for which the taxpayer appellees sought refunds. (The period covered by the second suit filed by taxpayer Partridge (Civ. No. C82-0050, D. Wyo.) covers the period March 1 through December 31, 1980; production in the exempt regions of Alaska commenced on December 14, 1981. See Kye Trout affidavit of February 15, 1982, attached to Motion of Plaintiffs Partridge, Ptasynski, Avery, and Calvin Petroleum for Summary Judgment.) But taxpayer appellees have paid taxes pursuant to a statute that unconstitutionally distinguishes between their production and equivalent production in Alaska. The non-uniformity had immediate effects—the encouragement of investment in production in the exempt regions of Alaska. As such production has in fact commenced, it is clear that the unconstitutionality is not merely a linguistic matter, but one with real effect, giving illegal advantage to taxpayer appellees' competitors who are producing in Alaska. Ripeness is determined as of the time of judicial decision. See *The Regional Rail Reorganization Act Cases*, 419 U.S. 102, 139-40 (1974). The only effect of finding the tax to be uniform on the basis of this transformed ripeness argument would be to delay definitive resolution of the issue. The interests of defendant, appellees, and the public as a whole call emphatically for avoiding any such delay.

Clause until the decision below. The Government seems to regard that fact as supporting its argument that the Court should now supplant its 200-year old rule with some vague "rational basis" test. Quite the contrary, the 200 years of experience suggest the wisdom of continued adherence to the established rule. This is a constitutional success story, if ever there was one. For 200 years Congress has evidently been able to exercise its taxing power successfully without violating this straightforward prohibition. For the Court now to jettison the established understanding would only invite Congressional testing of the new line. The Court ultimately would have to (1) render the Clause superfluous (by equating it with the "rational basis" test applied to economic legislation under the Equal Protection Clause)[23] or (2) embark on a process of case-by-case review of each geographically non-uniform tax to see whether it contained enough of the evils feared by the framers to justify invalidation. Adherence to plain and long-established principle, however, will preserve the requirement's advantageous effects without in any way obstructing Congressional adoption of sound tax policy.

## II. The Only Appropriate Remedy Is to Invalidate the Windfall Profit Tax; There Is No Authority for Judicial Imposition of Such a Tax on Alaska.

The District Court concluded that it was "clear that the Alaska exemption was the result of negotiations and compromise, and that the Act as it exists today would not have passed without the invalid Alaska provision." J.S., App. A, 9a. Accordingly, the Court concluded that it would be improper for a court to extend the Tax to the exempt portions of Alaska, and instead struck the Tax down. The District Court's reading of the Congressional intent is clearly correct. Judicial imposition of the Windfall Profit Tax on the exempt portions of Alaska

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[23] The Court has recently refused a similar invitation to eliminate the uniformity requirement of the Bankruptcy Clause. See *Railway Labor Executives Ass'n* v. *Gibbons*, 102 S. Ct. 1169, 1177 n.11 (1982).

would run counter to Congress's explicit, resolute decision in favor of exemption.

**A. The principles governing separability support the District Court's decision.**

The ability of a court to save an unconstitutional enactment by severing a portion of it depends upon whether the legislature would have enacted the statute without the provision sought to be severed. See, *e.g.*, *Zobel* v. *Williams*, 102 S. Ct. 2309, 2315 (1982); *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976); *Champlin Refining Co.* v. *Corporation Commission*, 286 U.S. 210, 234-35 (1932). See generally 2 *Sutherland, Statutory Construction*, § 44.04 (4th ed. C. Sands 1973) (hereinafter cited as "*Sutherland* §____").

In answering this question, the courts have looked to various factors, including whether the statute constitutes a single integrated scheme, whether the provision sought to be severed is a mere detail or an unimportant subsidiary portion of the statute, whether severance would defeat a dominant purpose of the statute, and whether Congress has expressly indicated its intent through aids to statutory construction such as the inclusion of a separability clause. See generally *Sutherland* §§ 44.04-44.11. Analysis of the Act and its legislative history in light of these factors compels the conclusion that Congress was firmly opposed to extension of the Tax to the exempt regions of Alaska. See part II. C. *infra*.

Two additional principles are highly relevant to the present case. First, the Court has been most reluctant to engage in severance when such action entails resolution of policy values committed by the Constitution to Congress and is therefore clearly legislative in nature. In *Marchetti* v. *United States*, 390 U.S. 39 (1968), for example, the Court refused a government invitation to save the occupational wagering tax by restricting the use of information thereby obtained. Explaining its refusal, the Court said:

> We cannot know how Congress would assess the competing demands of the federal treasury and of state gambling

> prohibitions; we are, however, entirely certain that the Constitution has entrusted to Congress, and not to this Court, the task of striking an appropriate balance among such values.

390 U.S. at 59-60. See also *Northern Pipeline Construction Co.* v. *Marathon Pipeline Co.*, 102 S. Ct. 2858, 2880 n.40 (1982).

The extreme range of the Government's proposed "severance" solutions—extending the tax to Alaska or creating an entirely new exemption for newly discovered oil (see J.S., 26 n.32)—clearly illustrates the legislative character of the decisions that it invites the Court to make. Moreover, the reasons for the Court's historic refusal to engage in judicial legislation are most forceful when the decision to sever would actually involve *imposition* of a tax on parties that Congress decided not to tax. A more purely legislative act than that suggested by the government is hard to imagine.

Second, this Court has emphatically recognized that when a tax scheme draws an unconstitutional distinction, the relief for the burdened taxpayer cannot be limited to a tax *increase* for those whom the legislature has unconstitutionally favored. In *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239 (1931), holding that a state had violated the Equal Protection Clause by taxing the shares of a national bank more severely than those of similar state banks, the Court rejected the proposed remedy of modifying the statute to raise the tax rates for state banks. Writing for the Court, Justice Brandeis stated:

> The right invoked is that to equal treatment; and such treatment will be attained if either their competitors' taxes are increased or their own reduced. But it is well settled that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law, cannot be required himself to assume the

burden of seeking an increase of the taxes which the others should have paid.

284 U.S. at 247.[24] Severance of the Alaska exemption would, of course, burden taxpayers in precisely the way that Justice Brandeis said they must not be burdened.[25]

If this Court were to abandon the principle applied by Justice Brandeis in *Iowa-Des Moines National Bank* v. *Bennett*, it would put itself in the extraordinary position of judicially imposing a retroactive tax on oil producers who had invested in the exempt areas of Alaska in specific reliance on the Alaska exemption. Such a retroactive tax would raise serious Constitutional questions, even if done by Congress. See *Nichols* v. *Coolidge*, 274 U.S. 531, 542-43 (1927).

**B. The Internal Revenue Code's general separability provision does not authorize judicial extension of the Windfall Profit Tax to Alaska.**

The Government relies considerably on the general separability clause in the Internal Revenue Code, 26 U.S.C. Section 7852(a), which provides:

> If any provision of this title, or any application thereof to any person or circumstances, is held invalid, the remainder of the title, and the application of such provision to other persons or circumstances, shall not be affected thereby.

For two reasons Section 7852(a) cannot be said to authorize judicial extension of the Tax to the exempt regions of Alaska.

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[24] See also *Cumberland Coal Co.* v. *Board of Revision*, 284 U.S. 23 (1931); *Greene* v. *Louisville & Interurban Ry.*, 244 U.S. 499, 514-519 (1916); *Chicago Great Western Ry.* v. *Kendall*, 266 U.S. 94, 98 (1924); *Sioux City Bridge Co.* v. *Dakota County*, 260 U.S. 441 (1923).

[25] *Utah Power & Light Co.* v. *Pfost*, 286 U.S. 165 (1932), the Government's sole basis for asserting the opposite principle (see J.S., 25), indeed contains language contrary to the holding of *Iowa-Des Moines National Bank* v. *Bennett*, but the language is pure dictum.

First, Section 7852(a) is not aimed at enabling the courts to save discriminatory taxing statutes by taxing persons that Congress has elected not to tax. It is intended to save the Internal Revenue Code as a whole by authorizing the courts to excise provisions that unlawfully tax certain persons or circumstances. The "title" referred to in Section 7852(a) is Title 26, the Internal Revenue Code. The "invalid provision" in the instant case is the *Windfall Profit Tax by reason of its non-uniformity*. There is nothing invalid about a Congressional decision not to tax Alaskan oil; what is invalid is the imposition of a tax on oil in only 49 other states. The straightforward application of Section 7852(a), therefore, is to invalidate the Windfall Profit Tax.

This construction conforms to the precept laid down by Justice Brandeis in *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239 (1931) (discussed in part II.A. *supra*), that the remedy for an unlawfully discriminatory tax is relief for the party wrongly taxed, not judicial taxation of those exempted. It is inconceivable that Congress, in a generally worded provision such as Section 7852(a), should have reversed that understanding and have authorized judicial imposition of taxes on exempt transactions.

Second, even if the general separability clause of the Code were applicable to the specific exemption contained in Title I of the Act, the clause would not require that the Court sever the Alaskan exemption rather than declare Title I unconstitutional. A separability clause is an aid in determining legislative intent, not an inexorable command.[26]

In *Williams* v. *Standard Oil Co.*, 278 U.S. 235 (1929), this Court made clear that a separability provision does no more than reverse the normal presumption that an act should stand or fall as a whole. Invalidation of the enactment as a whole is

[26] *Railroad Retirement Board* v. *Alton Railroad Co.*, 295 U.S. 330 (1935); *Williams* v. *Standard Oil Co. of Louisiana*, 278 U.S. 235 (1929); *Dorchy* v. *Kansas*, 264 U.S. 286 (1924).

correct when the court finds a "clear probability that the invalid part being eliminated the Legislature would not have been satisfied with what remains." 278 U.S. at 242.

Moreover, where the separability clause relied on is a general separability clause in a pre-existing statute, its aid in determining legislative intent is very much weakened. As was pointed out in *Sutherland* § 44.11 at 356:

> [I]t is a reasonable inference that because a general act cannot control subsequent legislative intent and therefore is questionable evidence of it, less weight may attach to such a general rule of separability than to the clause in a separate act.

Even if a particularized separability clause were present, it would not permit the court to alter a statute in any way that would defeat the statute's dominant purpose. As the Supreme Court stated in *Railroad Retirement Board* v. *Alton Railroad Co.*,

> [N]otwithstanding the presumption in favor of divisibility which arises from the legislative declaration, we cannot rewrite a statute and give it an effect altogether different from that sought by the measure viewed as a whole.

295 U.S. at 362. There, the Court struck down the entire Railroad Retirement Act rather than sever provisions which were found to be necessary for the accomplishment of the act's dominant purpose. See also *McGinnis* v. *Royster*, 410 U.S. 263 (1973) (the removal of even a "subordinate" purpose may shift altogether the consensus of legislative judgment supporting the statute).

Thus, even if the literal terms of Section 7852(a) applied to the Alaska exemption, the necessary inquiry into legislative purposes would remain. That history shows not just the "clear probability" but the certainty that Congress would not have adopted the Tax in its present form without the Alaskan exemption.

### C. The legislative history of the Act demonstrates a resolute Congressional intention that the Tax should not apply in the exempt parts of Alaska.

An analysis of the history of the Act reveals Congressional assertion of six major objectives: (1) the encouragement of domestic production; (2) reducing U.S. dependence on imported oil; (3) the generation of tax revenues; (4) the encouragement of energy conservation; (5) punishing domestic oil producers for some undefined conduct; and (6) the granting of low income energy assistance. The legislative history is replete with references to the balance struck in the Act among these competing goals.[27]

The Alaskan exemption was seen by Congress as being an integral part of this scheme, and in particular, as being an important part of the balance struck between the interest in enhanced domestic production and the generation of tax revenues. As was pointed out in the House Ways and Means Committee Report on an earlier version of the bill:

> To provide the appropriate production incentives, the bill provides special treatment for newly discovered oil, certain Alaskan oil, and incremental oil production from qualified tertiary recovery projects . . . .
>
> . . . .
>
> . . . [A] relatively heavy tax on tier one and tier two oil, along with the *more lenient treatment of* newly discovered, *Alaskan* and tertiary *oil, strikes the appropriate balance between revenue needs and production incentives.*

H.R. Rep. No. 304, 96th Cong., 1st Sess. 14 (1979), *reprinted in* 1980 U.S. Code Cong. & Ad. News 587, 600 (emphasis added).

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[27] See, *e.g.*, 126 Cong. Rec. H1834 (daily ed. Mar. 13, 1980) (remarks of Rep. Ullman); 126 Cong. Rec. S2630 (daily ed. Mar. 19, 1980) (remarks of Sen. Gravel); 126 Cong. Rec. S2855 (daily ed. Mar. 24, 1980) (remarks of Sen. Baucus).

The Senate Finance Committee Report also emphasized the concern over enhanced domestic energy production:

> The ultimate solution to the energy problem does not lie in taxing energy producers or simply in helping people cope with higher prices; it lies in reducing our consumption of energy and in *increasing domestic energy production*. A very important part of the Committee substitute is a program of tax incentives designed to achieve these goals.

S. Rep. No. 394, 96th Cong., 1st Sess. 7 (1979), *reprinted in* 1980 U.S. Code Cong. & Ad. News 410, 418 (emphasis added).

The Alaskan exemption was a key element of the compromise based on the concern over incentives for increased domestic production. The importance of Alaska as an oil producing state was frequently emphasized. In debates it was pointed out that Alaska supplied approximately fifteen percent of domestic oil currently being produced, that Alaska produced roughly 1 out of 6 barrels per day, and that 800 million barrels of known reserves still remained in the west (exempt) end of the Sadlerochit Reservoir.[28] In addition to known reserves in Prudhoe Bay, Senate discussions noted the discovered but as yet unproven reserves in the Kuparuk and Lisburne formations. 125 Cong. Rec. S17715 (daily ed. Dec. 4, 1979) (remarks of Sen. Bradley). In general, Congress believed that there was a tremendous amount of oil yet to be produced in Alaska and that this oil should be exempt from the Tax.[29]

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[28] 126 Cong. Rec. H1842-43 (daily ed. Mar. 13, 1980) (remarks of Rep. Young); 125 Cong. Rec. S17666 (daily ed. Dec. 3, 1979) (remarks of Sen. Stevens). Current United States government estimates of the reserves in the exempt portions of the Sadlerochit Reservoir (*i.e.*, the portion of that reservoir outside Prudhoe Bay) are now nearly double the figure used by Senator Stevens. See Statement *supra*.

[29] See 125 Cong. Rec. S18137 (daily ed. Dec. 10, 1979) (remarks of Sen. Long); 126 Cong. Rec. S2772 (daily ed. Mar. 20, 1980) (remarks of Sen. Bellmon).

Recognizing that the Tax would have a detrimental impact on production, Congress sought by the Alaska exemption to minimize its effect on this special area, which it viewed as peculiarly promising. The Joint Explanatory Statement of the Committee of Conference, which was the result of the compromise between the House and Senate delegates, reflects the concern that without an exemption from the tax, the important oil producing regions in Alaska would not be developed:

> The exemption of Alaskan oil production for the designated locations reflects the concern of the conferees that taxation of this production would discourage exploration and development of reservoirs in areas of extreme climatic conditions.

H. Conf. Rep. No. 817, 96th Cong., 2d Sess. 103, *reprinted in* 1980 U.S. Code Cong. & Ad. News 642, 656.

The legislative history of the Alaska exemption demonstrates its integral relation to the legislative judgment to apply the Tax to newly discovered oil. In one form or another, the exemption persisted through every stage of the Tax's evolution. The House Ways and Means Committee bill covered new oil but exempted Alaskan oil produced north of the Arctic Circle except for the Sadlerochit reserves already in production. H.R. Rep. No. 304, 96th Cong., 1st Sess. 30, *reprinted in* 1980 U.S. Code Cong. & Ad. News 586, 612-13. The Senate Finance Committee bill exempted all newly discovered oil. S. Rep. No. 394, 96th Cong., 1st Sess. 35-37, *reprinted in* 1980 U.S. Code Cong. & Ad. News 410, 444-446. This mooted any question of an Alaskan exemption, for any Alaskan production (other than from the portion of the Sadlerochit reservoir in the Prudhoe Bay field) would have qualified as newly discovered.

The Senate decision to extend the Tax to newly discovered oil and to exempt Alaskan production was a single, integrated decision. It was, in essence, a decision to tax newly discovered oil in 49 states. That decision played a vital role in the resolution of a stalemate that had developed between those who sought to extend the tax and those opposed, either to the tax as a whole or to its extension. It was the heart of the essential compromise that paved the way for adoption of the Tax.

Debate on the Tax bill had begun on November 15, 1979, but, starting as early as December 3, 1979, the official record of the Senate debate contains allusions to intensive behind-the-scenes negotiations between these forces.[30] To maintain the pressure on the negotiators, the Majority Leader, Senator Byrd of West Virginia, frequently kept the Senate in session into the evening. Allusions to threatened or actual delaying actions were frequent, as was evidence of such action.[31] Senator Long indicated that the committed resistance of a single Senator might jeopardize passage of *any* bill. 125 Cong. Rec. S18041 (daily ed. Dec. 7, 1979). Cloture votes were threatened, then delayed. See 125 Cong. Rec. S18039-42, S18052 (daily ed. Dec. 7, 1979) (remarks of Senators Byrd, Long, and Dole).

Finally, on December 14, 1979, the logjam broke. The major participants in the behind-the-scenes negotiations arrived at a compromise, pursuant to which the Senate extended the Tax to "newly discovered oil (other than newly discovered oil produced north of the Arctic Circle)." See 125 Cong. Rec. S18564 (daily ed. Dec. 14, 1979)(Amendment No. 877 as modified), adopted at S18567 (Dec. 14, 1979).

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[30] See, *e.g.*, 125 Cong. Rec. at S17688 (daily ed. Dec. 3, 1979) (remarks of Sen. Byrd); S17707 (daily ed. Dec. 4, 1979) (remarks of Sen. Byrd) and S18509 (daily ed. Dec. 14, 1979) (remarks of Sen. Boschwitz).

[31] See, *e.g.*, 125 Cong. Rec. at S17707 (daily ed. Dec. 4, 1979) (Sen. Stevens, indicating readiness to withhold otherwise appropriate unanimous consents); S17707-17708 (daily ed. Dec. 4, 1979)(Sen. Byrd, asserting desire to avoid filibuster); S17805 (daily ed. Dec. 5, 1979)(Sen. Dole, threatening a "long debate" if proposed amendment restricting percentage depletion were passed); S17932 (daily ed. Dec. 6, 1979) (tabling of amendment on "bracket creep" in income tax); S18136 (daily ed. Dec. 10, 1979) (defeat of amendment to limit federal budget as a percentage of gross national product); and S18039-41 and S18050-51 (daily ed. Dec. 7, 1979) (allusions by Senators Byrd, Long and Dole to the problem of non-germane amendments).

Throughout the extensive negotiations Senator Stevens of Alaska, the Acting Minority Leader, played a significant role. See 125 Cong. Rec. S18564, S18565 (daily ed. Dec. 14, 1979) (expressions of appreciation by Senators Dole and Nelson to Senator Stevens for his work on the compromise). In expressing his reluctant approval of the compromise measure, he stated his flat opposition to any further amendment that would increase the tax on Alaskan oil. 125 Cong. Rec. S18565 (daily ed. Dec. 14, 1979). The timing, the key role of Senator Stevens, and Senator Stevens's unequivocal position opposing taxation of newly discovered Alaskan oil, all indicate that without the Alaska exemption the tax would at least have exempted newly discovered oil.

The Alaska exemption was thus an integral part of the compromises necessary to secure final passage of the Act. Its removal would effectively "mutilate" the work of Congress. See *Williams* v. *Standard Oil Co.*, 278 U.S. 235, 242 (1929).

The Government lays great stress upon selected portions of some observations made by Senator Long on the floor of the Senate. (J.S., 23-24.) Senator Long at one point declared that should the courts find that the Alaskan exemption violates the Uniformity Clause of the Constitution, "that provision should be regarded as a nullity and . . . Alaska will pay the same 30-percent tax on new oil as everybody else." 126 Cong. Rec. S3056 (daily ed. Mar. 26, 1980) (remarks of Sen. Long). Even if this were Senator Long's intent, however, the intent of Congress as a whole is quite a different matter. See *American Smelting and Refining Company* v. *Occupational Safety and Health Review Commission*, 501 F.2d 504, 509 (8th Cir. 1974). There was neither a debate nor vote on the issue of separability, and no separability clause was inserted in this Act. No thought similar to Senator Long's was expressed by any other Senator or in the House of Representatives. No Senator reacted in any way to Senator Long's observations. No committee report referred in any way to separability.

Moreover, Senator Long himself acknowledged that Congress would not be satisfied with the Act without the exemp-

tion. He noted that as a result of severance, Alaska would pay the same 30 percent tax as everybody else, but stated that "if that were to be the case we would expect to act in the future to remedy this and to try to provide some consideration based on the cost of transportation and the high cost of developing oil and producing oil in those areas north of the Arctic Circle, and those areas that are far removed from the pipeline or any kind of feasible water transportation." 126 Cong. Rec. S3056 (daily ed. Mar. 26, 1980).

In other words, even for Senator Long the Tax without the Alaska exemption could not stand in the form adopted. Taken as a whole, his statements reflect his recognition that the *specific circumstances* justifying a judicial decision to sever were absent in this instance.[32]

The legislative history of the Windfall Profit Tax thus shows that Congress would not have been satisfied with the Tax had it not included the Alaskan exemption. The major goal intended by Congress, the reconciliation of the Act's revenue-raising purpose with concern over excessive disincentives to domestic energy production, cannot be effected if the legislative balance is disrupted through elimination of the Alaskan exemption.

### D. Summary

There is simply no way for the Court to gauge what form the Tax would have taken in the absence of the Alaskan exemption. The extraordinary range of alternatives that the Government proposes in the name of separability—extension of the Tax to Alaska, judicial creation of an exemption for newly discovered oil—demonstrate the haphazard character of any such venture into judicial legislation. Rather than indulge in hopeless guesswork, the Court should affirm the District

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[32] Indeed, perhaps because of that recognition, Senator Long has since publicly expressed his view that the entire Tax should be invalidated. See *The Shreveport Times* (November 25, 1982), p. 25, col. 2.

Court's invalidation of the Tax, leaving to Congress the task of remedial surgery.

## CONCLUSION

Summary affirmance of the District Court decision is appropriate. When a Constitutional provision has enjoyed a plain meaning for 200 years, and has in no way thwarted Congressional development of sound tax policy, there is no need for briefing and oral argument on the Government's proposal that the Uniformity Clause be transformed into an Equal Protection Clause for taxpayers.

Nor do the Government's proposed "severance" remedies require any extended consideration. Either taxation of production that Congress has most emphatically decided to exempt, or definition of a whole new exemption for newly discovered oil, would be wholly inappropriate judicial legislation. As the first option would involve retroactive taxation of oil producers who have invested several hundred million dollars in production in the exempt areas of Alaska in specific reliance on the exemption, it would raise serious additional Constitutional questions.

In order that Congress may quickly get on with the task of effecting a cure, and that taxpayers may soon have a firm basis

for planning, the Court should summarily affirm the decision of the District Court.

Respectfully submitted,

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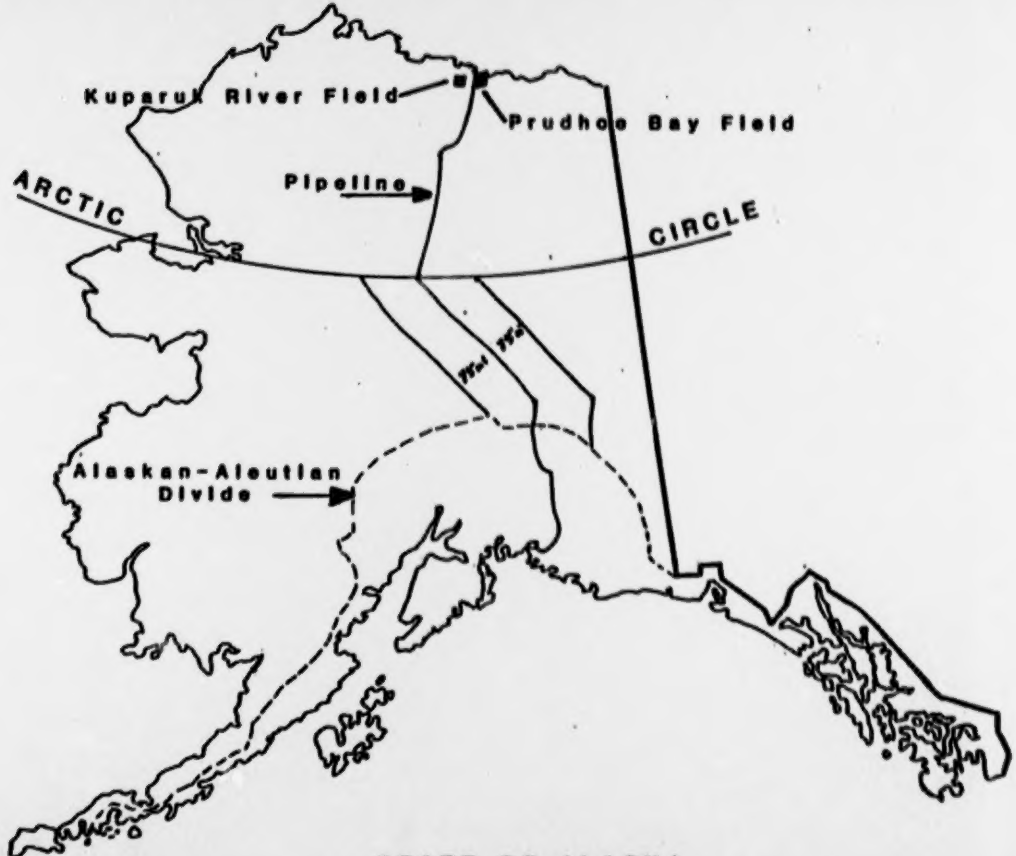
January 1983

APPENDIX A




STATE OF ALASKA

# APPENDIX B

## TECHNICAL CORRECTION AMENDMENTS

The Technical Corrections Act of 1982, Pub. L. No. 97-448, 96 Stat. 2365, amends Section 4994(e) to read as follows:

(e) Exempt Alaskan Oil.—For purposes of this chapter, the term 'exempt Alaskan Oil' means any crude oil (other than Sadlerochit oil) which is produced—

(1) from a well located north of the Arctic Circle or from a reservoir from which oil has been produced in commercial quantities through such well, or

(2) from a well located on the northerly side of the divides of the Alaska and Aleutian ranges and at least 75 miles from the nearest point on the Trans-Alaska Pipeline system.

Supreme Court, U.S.
FILED
JAN 14 1983
ALEXANDER L. STEVAS
CLERK

# NO. 82-1066

## In the Supreme Court of the United States

OCTOBER TERM, 1982

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UNITED STATES OF AMERICA, APPELLANT

V.

HARRY PTASYNSKI, ET AL, APPELLEES

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

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# MOTION OF THE STATE OF LOUISIANA TO AFFIRM

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82-1066

UNITED STATES OF AMERICA, APPELLANT

V.

HENRY PTASYNSKI, ET AL., APPELLEES

APPEAL FROM UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

# MOTION OF THE STATE OF LOUISIANA TO AFFIRM

The State of Louisiana, an intervening plaintiff below and an appellee herein, respectfully moves the Court pursuant to Rule 16 of the Rules of the Supreme Court of the United States for summary affirmance of the judgment of the United States District Court for the District of Wyoming holding Title I of the Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223 (the "Act") unconstitutional as being in violation of Article I, § 8, cl. 1 of the Constitution of the United States (the "Uniformity Clause"). The decision of the district court is eminently correct and none of the arguments to the contrary advanced by the government in its Jurisdictional Statement are substantial enough to warrant additional argument before this Court.

## STATEMENT

The Memorandum Opinion, Judgment, and Amended

Judgment[1] of the district court are set forth as appendices to the government's Jurisdictional Statement, as are the texts of the Uniformity Clause and the Act. Therefore, these attachments will not be reproduced herein.

As is noted in the Jurisdictional Statement, the plaintiffs below, appellees herein, include a number of independent domestic oil producers and/or royalty owners seeking a refund of windfall profit taxes paid by them under the Act and as to which administrative refund claims were filed. These individual taxpayer plaintiffs additionally prayed for a declaratory judgment that the Act is unconstitutional and an injunction against further assessment and collection of taxes under the Act. Thirty national, regional and state associations representing a broad spectrum of the oil industry joined with the individual taxpayer plaintiffs in bringing the action; however, by order dated August 26, 1981, the district court granted the government's motion to dismiss as to the associations but allowed them to remain parties to the action as permissive intervenors. By order dated July 2, 1981, the district court allowed the States of Louisiana and Texas to file their respective complaints in intervention seeking a declaration that the Act is unconstitutional and an injunction against further assessment and collection of the taxes imposed by the Act.

After successfully defeating the government's motion to dismiss, the individual taxpayer plaintiffs filed a motion for summary judgment, which was joined in by the association plaintiff-intervenors. The State of Louisiana likewise filed a motion for summary judgment, as did the State of Texas,[2] and the government filed a cross motion

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[1] Although the government refers to two amended judgments, dated November 12 and November 15, 1982, respectively, only the amended judgment of November 15, 1982 was filed of record in the district court.

[2] Although the complaints in intervention filed by both Texas and Louisiana challenged the Act under the Tenth Amendment to the United

for summary judgment. For the reasons stated in its Memorandum Opinion dated November 4, 1982, the district court found that the Act violates the Uniformity Clause, and by amended judgment entered November 15, 1982, the court specifically held the Act unconstitutional and ordered that summary judgment be entered in accordance with the Memorandum Opinion.

As the government points out in its Jurisdictional Statement, the dollar amounts at stake in this action are of enormous magnitude. This is particularly true for the individual taxpayer plaintiffs and the thousands of other taxpayers who, by reason of the district court's stay of further proceedings in the case pending appeal, must continue to pay a tax which is clearly unconstitutional and which has already been judicially declared to be unconstitutional. Nevertheless, despite the substantial impact of the decision in this case, the issues involved are straightforward and relatively simple. As will be shown below, there is no question but that the district court's judgment is correct.

## ARGUMENT

### I. THERE IS NO SUBSTANTIAL QUESTION AS TO THE CORRECTNESS OF THE DISTRICT COURT'S HOLDING THAT THE ACT VIOLATES THE UNIFORMITY CLAUSE.

(Footnote 2 continued)
States Constitution as well as under the Uniformity Clause, their respective motions for summary judgment encompassed only their claims under the Uniformity Clause. The Tenth Amendment issue is not presently before the Court.

Article I, § 8, cl. 1 of the Constitution of the United States provides:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but *all Duties, Imposts and Excises shall be uniform throughout the United States.*

(Emphasis added.)

The Act itself characterizes the tax imposed as an excise, *see* 26 U.S.C. § 4986(a), and the government concurs in this characterization. Jurisdictional Statement, at 14-15 n.22. There is no contention by the government that the district court erred in holding that the tax is governed by and must comply with the constitutional limitation contained in the Uniformity Clause.

Nor does the government take issue with the district court's conclusion, based on the jurisprudence, that the uniformity required by the Constitution is strictly geographic uniformity. *Id.* at 14. The district court held that the Act on its face violates this requirement because of the existence of the Alaskan exemption. This holding is clearly correct. By its terms, the Act applies to "taxable crude oil," which is defined as "all domestic crude oil other than exempt oil." *See* 26 U.S.C. §§ 4986(a), 4991(a). "Exempt oil" is defined to include "exempt Alaskan oil," which in turn is defined as:

> [A]ny crude oil (other than Sadlerochit oil) which is produced—
>
> (1) from a reservoir from which oil has been produced in commercial quantities through a well located north of the Arctic Circle, or
>
> (2) from a well located on the northerly side

> of the divide of the Alaska-Aleutian Range and at least 75 miles from the nearest point on the Trans-Alaska Pipeline System.

26 U.S.C. §§ 4991(b), 4994(e).

When geographic location determines whether or to what extent a subject will be taxed, it is apparent that the tax is not geographically uniform. And despite its attempt to characterize the Alaskan exemption as a classification which merely takes geographical considerations into account, the government concedes, as it must, that the exemption is "geographically defined so as to exclude oil located in all of the 50 states except portions of Alaska." Jurisdictional Statement, at 17. *See also id.* at 18 (the exemption is defined in terms of the geographic location of the oil); *id.* at 20 (Congress chose to define the scope of the exemption in terms of geographic location).

The only contention advanced by the government in seeking to overturn the the district court's holding is the novel contention that, despite a lack of geographic uniformity, the Act can withstand constitutional scrutiny because it represents an attempt by "substantial congressional majorities" to accommodate "special circumstances" purportedly confined to a limited geographical area. Jurisdictional Statement, at 14. Nevertheless, the adoption of such a contention is repelled by the literal terms and spirit of the Uniformity Clause, as well as by jurisprudence construing the clause spanning almost 200 years.

Despite the absolute language of the Uniformity Clause, the government argues that it was really only intended to prohibit non-uniformity where a geographical distinction results from "combinations" other than of "substantial congressional majorities," and where the distinction strikes at the "vital interests" of one region as opposed to accommodating "special circumstances confined to a limited geographical area." Jurisdictional Statement, at 14. In support of its limited view of the purpose of

the Uniformity Clause, the government quotes the following explanation by Justice Story:

> The answer to the ***[uniformity requirement] may be given in a few words. It was to cut off all undue preferences of one state over another, in the regulation of subjects affecting their common interests. Unless duties, imposts and excises were uniform, the grossest and most oppressive inequalities vitally affecting the pursuits and employments of the people of different states might exist.

Jurisdictional Statement, at 14, quoting J. Story, *Commentaries on the Constitution of the United States* § 957, at 673 (2d ed. 1851).

The State of Louisiana concurs that Justice Story's view of the purpose of the clause is the proper one; however, the quotation does nothing to support the government's argument. Justice Story points out that the purpose of the clause was to prohibit *all* undue preferences of *one* state over another, not merely those imposed by "combinations" or those that would strike at the "vital interests" of a particular region. Justice Story also points out that this purpose was to be accomplished, and "the grossest and most oppressive inequalities" avoided, by requiring that indirect taxes be uniform throughout the United States. There are no qualifications on this requirement.

Not surprisingly, the government does not cite any jurisprudential authority for its novel construction of the purpose of the Uniformity Clause. The government merely asserts that the role of judicial review would not "be at its zenith" were the Court to restrain Congress "from discriminating against 49 states in favor of one." Jurisdictional Statement, at 14. Nevertheless, after an exhaustive review of the history of the Uniformity Clause, the Supreme Court concluded in *Knowlton v. Moore,* 178 U.S.

41, 20 S.Ct. 747, 766 (1900), that this is exactly what the Uniformity Clause was intended to prohibit.

The *Knowlton* Court pointed out that in discussions regarding the need to create a federal government which would have the necessary taxing power,

> the sole and the only question which was ever present and in every form was discussed, was the operation of any taxing power which might be granted to Congress upon the respective states; in other words, the discrimination as regards states which might arise from a greater or lesser proportion of any tax being paid within the geographical limits of a particular state.

20 S.Ct. at 769. The Court concluded that "the possible discrimination against one or more states was the only thing intended to be provided for by the rule which uniformity imposed upon the power to levy duties, impost taxes, and excises." *Id.* at 766. Thus, the geographical limitation on duties, imposts and excises was construed as having the same purpose as the requirement that direct taxes be apportioned—"the protection of the states, to prevent their being called upon to contribute more than was deemed their due share of the burden." *Id.*

The purpose of the Uniformity Clause was again examined in *Downes v. Bidwell*, 182 U.S. 244, 21 S.Ct. 770, 783 (1901), where the Court stated:

> In determining the meaning of the words of article 1, section 8, "uniform throughout the United States," we are bound to consider, not only the provisions forbidding preference being given to the ports of one state over those of another..., but the other clauses declaring that no tax or duty shall be laid on articles exported from any state, and that no state shall, without the consent of Congress, lay any imposts or duties upon imports

> or exports, nor any duty on tonnage. *The object of all of these was to protect the states which united in forming the Constitution from discriminations by Congress, which would operate unfairly or injuriously upon some states and not equally upon others.*

(Emphasis added.) *See Hylton v. United States,* 3 U.S. (Dall.) 171, 179 (1796) (articles taxed in one state should be taxed in another; in this way the spirit of jealously is appeased, and tranquility preserved).

Based on the literal terms of the Uniformity Clause and the commentary and jurisprudence discussing the purpose of the clause, there is no question but that it was intended to prohibit all discriminatory tax burdens, not merely those imposed by a majority of states upon a minority. Just as clearly, the purpose of the clause is violated by the Act's admitted geographical discrimination, notwithstanding the government's assertion that the discrimination is "against 49 states in favor of one."[3]

More importantly, however, the geographical distinction contained in the Act violates the Uniformity Clause regardless of the discrimination which admittedly results from that distinction. As this Court recognized in *Knowlton v. Moore,* the purpose of the clause—to prevent the *possible* discrimination against one or more states which *might* arise from a greater or lesser proportion of any tax being paid within the geographical limits of a particular state—was accomplished by the *absolute* require-

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[3] Whether the government's assertion concerning the nature of the discrimination is correct is questionable. The legislative history cited by the government (Jurisdictional Statement, at 11-13) demonstrates that the Alaskan exemption was crucial to the imposition of the tax on "newly discovered oil," and hence, to the passage of the Act. Because most of the tax would be paid on crude oil produced in the major producing states such as Louisiana and Texas, a "majority" could have granted an exemption to Alaskan crude oil to insure that the tax would be paid on crude oil produced in a "minority" of states.

ment that indirect taxes be uniform. 20 S.Ct. at 772. In holding that the uniformity required is strictly geographical uniformity the Court laid down the rule "that whatever plan or method Congress adopts for laying the tax in question, the same plan and the same method must be made operative throughout the United States; that is to say, that *wherever a subject is taxed anywhere, the same must be taxed everywhere throughout the United States, and at the same rate.*" *Id.* at 764. (emphasis added).[4]

Despite its recognition that the Constitution requires geographic uniformity, the government argues that Congress should be free to disregard the requirement with impunity whenever it is justified in doing so by the need to accommodate particular conditions purportedly confined to one geographic area. The argument that particular local conditions might justify deviation from the principle of geographic uniformity, however, is not new. That a geographically uniform impost or excise might operate unequally by reason of the unequal distribution or existence of the article taxed among the respective states was urged repeatedly in the Continental Congress as a reason why the requirement that duties, imposts and excises be uniform throughout the United States should not be adopted. *See generally Knowlton v. Moore,* 20 S.Ct. at 778. These arguments were rejected. In adopting the Uniformity Clause, a conscious decision was made to require geographic uniformity, despite full recognition that a geographically uniform impost, duty or excise might operate unequally due to particular local conditions, and thus be intrinsically non-uniform.

[4] Thus, it is apparent that it is non-uniformity not discrimination, much less "oppressive discrimination," that is proscribed by the clause. In an analogous case, this Court held that the uniformity requirement for bankruptcy laws "is not an Equal Protection Clause for bankrupts." *Railway Labor Executives' Ass'n v. Gibbons,* 455 U.S. 457, 102 S.Ct. 1169, 1177 n.11 (1982). In this case as well, the issue is not whether Congress has discriminated but whether the law in question is uniform.

This Court as well has recognized that many geographically uniform taxes will of necessity be intrinsically non-uniform. Nevertheless, the Court consistently and repeatedly has held that intrinsic inequalities are irrelevant so long as indirect taxes are geographically uniform. Thus, in *Knowlton v. Moore*, it was held that a geographically uniform tax on legacies was constitutional regardless of the fact that the rate of taxation depended on a factor which varied with the testamentary and intestacy laws of the various states. Similarly, in *Flint v. Stone Tracy Co.*, 220 U.S. 107, 31 S.Ct. 342, 358 (1911), this Court held that a geographically uniform corporation tax was constitutional even though it may have operated unequally owing to different local conditions.[5]

Interestingly enough, this rule was first adopted in the *Head Money Cases*, 112 U.S. 580, 5 S.Ct. 247 (1884), the decision so heavily relied upon by the government herein. The Court there recognized that a geographically uniform excise might be intrinsically unequal, but adhered to the standard of geographical uniformity, stating:

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[5] *See also* Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 15 S.Ct. 673, 694 (1895); Billings v. United States, 232 U.S. 261, 34 S.Ct. 421, 424 (1914); Brushaber v. United Pac. R.R. Co., 240 U.S. 1, 36 S.Ct. 236, 244 (1916); LaBelle Iron Works v. United States, 256 U.S. 377, 41 S.Ct. 528, 532 (1921); Florida v. Mellon, 273 U.S. 12, 47 S.Ct. 265, 266 (1927); Bromley v. McCaughn, 280 U.S. 124, 50 S.Ct. 46 (1929); Poe v. Seaborn, 282 U.S. 101, 51 S.Ct. 58, 61 (1930); Phillips v. Commissioner of Internal Revenue, 283 U.S. 589, 51 S.Ct. 608, 613 (1931); Charles C. Steward Mach. Co. v. Davis, 301 S.Ct. 548, 57 S.Ct. 883 (1937); Riggs v. Del Drago, 317 U.S. 95, 63 S.Ct. 109 (1942); Fernandez v. Wiener, 326 U.S. 340, 66 S.Ct. 178 (1945). *Cf.* Patton v. Brady, 184 U.S. 608, 22 S.Ct. 493, 498 (1902) ("It is not the province of the judiciary to inquire whether the excise is reasonable in amount or in respect to the property to which it is applied").

> Is the tax on tobacco void because in many of the states no tobacco is raised or manufactured? Is the tax on distilled spirits void because a few states pay three-fourths of the revenue arising from it? The tax is uniform when it operates with the same force and effect in every place where the subject of it is found. The tax in this case, which, as far as it can be called a tax, is an excise duty on the business of bringing passengers from foreign countries into this by ocean navigation, is uniform and operates precisely alike in every port of the United States where such passengers can be landed. It is said that the statute violates the rule of uniformity and the provision of the constitution that "no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another," because it does not apply to passengers arriving in this country by railroad or other inland mode of conveyance. But the law applies to all *ports* alike, and evidently gives no preference to one over another, but is uniform in its operation in all ports of the United States.

5 S.Ct. at 252 (emphasis in original). Thus, the ultimate question in the Court's view was not, as the government suggests "whether Congress had a reasonable basis for distinguishing between the activity that was taxed in coastal states and the similar activity that was untaxed in inland states." Jurisdictional Statement, at 16. Rather, the ultimate inquiry was whether the tax operated "with the same force and effect in every place where the subject of it [was] found," and since the law in question applied to all ports wherever located, it was held to be geographically uniform and, therefore, constitutional.

To the extent that the government views the *Head Money Cases* as requiring Congress to have a rational basis for distinguishing between different, albeit similar, subjects of taxation, the government has misconstrued the

case. Similarly in error is the government's concession that "classifications that operate only in certain areas might be subject to special scrutiny in light of the purposes of the Uniformity Clause." Jurisdictional Statement, at 15. The above cited authorities are consistent in holding that the *only* requirement imposed by the Constitution is geographical uniformity. If this requirement is satisfied, it is irrelevant that other similar subjects might be treated differently (with or without rational justification) or that the tax might operate differently in different areas due to particular local conditions and thus be intrinsically non-uniform.[6]

Other than the *Head Money Cases*, the only authority relied upon by the government is the statement by this Court in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 159, 95 S.Ct. 335 (1974), where it was noted that the requirement of Article I, § 8, cl. 4 of the Constitution that laws on the subject of bankruptcies be uniform throughout the United States "does not deny Congress

[6] There is no serious contention by the government in this case that the subject of the Alaskan exemption is something other than that which is the subject of the tax. The tax is imposed on "taxable crude oil." 26 U.S.C. § 4986(a). "Exempt Alaskan oil" is defined as "any crude oil" produced from certain geographical locations. 26 U.S.C. §§ 4991(b), 4994(e). The Act thus does not distinguish between different subjects but between different geographic locations where the same subject (*i.e.*, crude oil) is produced. The government does seek to distinguish "newly discovered oil," the classification for which the exempt Alaskan oil would qualify if not exempt, from the other classifications of "crude oil" contained in the Act. Thus, the government phrases the issue in terms of whether Congress can constitutionally distinguish between North Slope "newly discovered oil" and other domestic "newly discovered oil." Jurisdictional Statement, at 20 n.28. *See also id.* at 17 ("the question is whether in fashioning the tax, Congress could, on the one hand, favor generally 'newly discovered oil' over 'old oil' and accord the most favorable treatment to 'newly discovered oil' located in certain areas"). Even if this distinction were supportable, it would be immaterial. Regardless of whether the subject of the tax is deemed to be "crude oil" or "newly discovered oil," the same subject existing both in the exempt areas of Alaska and outside the exempt areas is treated differently solely because of its geographic location.

power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems." Jurisdictional Statement, at 16. Read in context, however, this statement does not support the government's position that Congress has carte blanche to disregard the requirement of uniformity whenever a lack of uniformity can be justified by differences existing in particular parts of the country. The gorgraphically isolated problem which had prompted the legislation was the pendency of railroad reorganization proceedings. Since the Court specifically found that the reorganization proceedings affected by the statute were the only ones in fact existing in the country throughout the time the statute was in effect, the statute was able to take into account differences existing between different parts of the country without violating the requirement of geographic uniformity. The ultimate holding in the case was based on the Court's finding that the bankruptcy law there in question was in fact geographically uniform throughout the United States, not that any deviation from the requirement of uniformity was justified. Indeed, the Court confirmed that its construction of the bankruptcy clause's uniformity requirement comported with its construction of other "uniform" provisions in the Constitution, specifically citing the *Head Money Cases,* where it was held that a tax is "uniform" within the meaning of Article I, § 8, cl. 1 of the Constitution "when it operates with the same force and effect in every place where the subject of it is found."[7]

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[7] Similarly, the government argues that the geographical Alaskan exemption is merely a shorthand method used by Congress to exempt crude oil produced under severe climatic conditions and distant from existing transportation systems and markets. Jurisdictional Statement, at 20. This is not, however, a question of "mere niceties of congressional draftsmanship." *Id.* The Uniformity Clause contains no exceptions for congressional shorthand. In any case, it is extremely doubtful that Congress, as the government contends, could have drafted an exemption based on the "underlying conditions" that would "achieve precisely the same result" as the Alaskan exemption. *Id.*

In light of the universal and unwavering recognition that the Uniformity Clause requires strictly geographic uniformity, it is not surprising that, as the government points out, prior to the decision below, no taxing statute had ever been held invalid on the ground that it violated the clause. Jurisdictional Statement, at 13. Not until passage of the Act held unconstitutional here has Congress dared to disregard the unambiguous limitation on its taxing power that is contained in the Uniformity Clause.[8] Congress does not have the power to ignore the constitutional requirement of geographic uniformity in order to accommodate special circumstances purportedly existing only in a limited geographic area. There is no authority whatsoever to support the government's contention that Congress does have this power. Indeed, all of the authorities are to the contrary. Since the government has failed to raise a substantial question as to the district court's holding that the Act on its face violates the Uniformity Clause, further argument is unnecessary and the judgment of the district court should be summarily affirmed.[9]

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[8] A recent attempt by Congress to enact a non-uniform bankruptcy law was struck down by this Court just last term in *Railway Labor Executive's Association v. Gibbons*. Significantly, the majority opinion did not adopt the view that certain justifications might exist for deviations from the principle of strict geographic uniformity.

[9] In a footnote, the government asserts that because there was no production from the exempt regions of Alaska during the taxable periods for which the individual taxpayer plaintiffs claimed a refund, there is no violation of the Uniformity Clause. Jurisdictional Statement, at 20-21 n.28. Nevertheless, the district court was clearly correct when it rejected this argument, stating: "The contention is that the Act is unconstitutional on its face and thus, actual production in Alaska aside, plaintiffs have been and are being subjected to an invalid tax." Memorandum Opinion, at 6 (reproduced in Jurisdictional Statement, at 5a). That the government's argument fails to raise a substantial question is further illustrated by the fact that the taxable periods for which the individual taxpayer plaintiffs seek a refund has no relevance whatsoever to the claims of the States of Louisiana and Texas in their motions for summary judgment that the Act facially violates the Uniformity Clause.

## II. THERE IS NO SUBSTANTIAL QUESTION AS TO THE CORRECTNESS OF THE DISTRICT COURT'S HOLDING THAT THE UNCONSTITUTIONALITY OF THE ACT CANNOT BE CURED BY SEVERING THE ALASKAN EXEMPTION.

After consideration of all of the relevant factors, the district court correctly concluded that the unconstitutionality of the Act could not be cured by severing the Alaskan exemption. The government in its Jurisdictional Statement has not raised any substantial question as to the correctness of this decision.

In this Court, as it did in the district court, the government relies primarily on its contention that the general separability clause contained in the Internal Revenue Code of 1954, 26 U.S.C. § 7852(a), necessitates severance of the Alaskan exemption so as to cure the unconstitutionality of the Act and allow its remaining provisions to continue in effect. This separability clause provides:

> (a) Separability clause.—*If any provision of this title*, or the application thereof to any person or circumstances, *is held invalid, the remainder of the title*, and the application of such provision to other persons or circumstances, *shall not be affected thereby.*

(Emphasis added.)

It is readily apparent from the language of the clause that its intent was to preserve existing provisions of "the title," meaning Title 26, from invalidation. Obviously, it would be extremely unwieldly and undesirable if a constitutional flaw in a later appended tax provision could result in nullification of the entire Code. A correct interpretation of the general separability provision in the Code permits consideration of this Act apart from the remainder of the Code, allowing the Court to sever and nullify the Act

without affecting the remaining provisions of Title 26.

Nevertheless, the district court did not go as far as to hold that the general separability clause of the Internal Revenue Code is wholly inapplicable. Rather, the court merely refused to give the clause as much deferential consideration as the government argued it was due. This decision by the district court is fully supportable, since it has been recognized that where the separability clause relied upon is a general separability clause in a pre-existing statute, its aid in determining legislative intent is very much weakened. As was pointed out in 2 *Sutherland Statutory Construction* § 44.11, at 356 (4th ed. C. Sands 1973) (hereinafter cited as *Sutherland* § __):

> [I]t is a reasonable inference that because a general act cannot control subsequent legislative intent and therefore is questionable evidence of it, less weight may attach to such a general rule of separability than to the clause in a separate act.

In any event, as the government recognized, "the existence of a separability clause is not conclusive as to whether a statute will be held invalid as a whole or invalid only as to those specific provisions that directly offend the limitation imposed by the Constitution." Jurisdictional Statement, at 22. The ultimate question as regards separability is whether the legislature *intended* for the particular portion of the enactment in question to be severable. *Carter v. Carter Coal Co.*, 298 U.S. 238, 56 S.Ct. 855 (1936). *See* Jurisdictional Statement, at 22-23. Ultimately, the question is whether the legislature would have enacted the statute without the provision sought to be severed. *Rhode Island Federation of Teachers, AFL-CIO v. Norberg*, 630 F.2d 855, 863 (1st Cir. 1980), (citing *Champlin Refining Co. v. Corporation Comm'n*, 286 U.S. 210, 52 S.Ct. 559 (1932)). *See generally Sutherland* § 44.04.

After examining the legislative history of the Act,

the district court specifically found that "the Alaskan exemption was the result of negotiations and compromise, and that the Act as it exists today would not have been passed without the invalid Alaskan provision." Memorandum Opinion at 11 (reproduced in Jurisdictional Statement, at 9a) (citing H.R. Rep. No. 304, 96 Cong., 2d Sess. 30, *reprinted in* 1980 U.S. Code Cong. & Ad. News 587, 612-13; S. Rep. No. 394, 96 Cong., 2d Sess. 35-37, *reprinted in* 1980 U.S. Code Cong. & Ad. News 410, 444-446; 125 Cong. Rec. S 18564 (daily ed. Amendment No. 877 as modified), adopted at S 18567 (daily ed. Dec. 14, 1979); 125 Cong. Rec. S 18564, 18566, (daily ed. Dec. 14, 1979); 125 Cong. Rec. S 18565 (daily ed. Dec. 14, 1979)). No substantial question has been raised by the government as to the correctness of this finding.

The government itself recognizes that Congress was concerned "that the general imposition of a windfall profit tax with respect to all 'newly discovered oil' could have a deterrent effect on the future discovery and development of new North Slope oil." Jurisdictional Statement, at 24. Indeed, the government's prior briefs in this case show just how critical this concern was. Because the government's brief in support of its motion for summary judgment in the district court contains an excellent discussion of the importance of the Alaskan exemption in the overall statutory scheme, the section of that brief which discusses the legislative history of the exemption is attached hereto as Appendix A.

Suffice it to reiterate here that "the Act was a result of compromise and very careful balancing of a variety of national interests and problems." App. A, *infra*, A-3. The importance of the Alaskan exemption in this balance because of its role in encouraging the development of this country's petroleum resources is readily apparent from the government's discussion of the legislative history. App. A, *infra*. In the words of the government, "Congress made an exhaustive examination of relevant economic circumstances in the course of determining upon what oil pro-

duction the tax would be levied and to what degree." *Id.* at A-4. There is more than ample support in the legislative history for the government's conclusion that "Congress devoted a great deal of effort and debate to devise a way to make certain that the contemplated excise tax would not act as a disincentive to oil production in Alaska." *Id.* at A-9. Indeed, the government points out:

> The exemption of a portion of Alaskan oil production merely emphasizes the concern of Congress that imposition of the tax on certain Alaskan production would make it less likely that the state's resources would be developed fully.

*Id.* at A-8. And, as the government's discussion shows, Congress carefully considered alternatives to the Alaskan exemption which would have promoted the Act's purpose by encouraging domestic oil production, but these alternatives were rejected. *Id.* at A-9-12.

In view of the well documented concern of Congress with the need to include incentives in the Act to encourage domestic oil production, and the crucial importance of the Alaskan exemption in obtaining this goal, there is no substantial question as to the correctness of the district court's conclusion that Congress would not have passed the Act absent the exemption.

The only reference to the legislative history of the Act cited by the government in support of its contention that Congress would have enacted the Act as it exists today even without the Alaskan exemption is the statement by Senator Long to the effect that "it is our intention that in the event the courts should find this favorable treatment for Alaska *** should violate the conformity provision in the Constitution, that provision should be regarded as nullity and that Alaska will pay the same 30-percent tax on new oil as everybody else." 126 Cong. Rec. S 3056 (daily ed. March 26, 1980). Although this may have been Senator Long's intent, or even his view of what other unidentified

members of Congress may have intended, it is not necessarily indicative of the intent of the entire Congress. As the district court in this case correctly pointed out:

> The most articulate of individual observations, while providing a certain amount of insight, is not necessarily indicative of the entire Congressional spirit.

Memorandum Opinion, at 10 (reproduced in Jurisdictional statement, at 8a) (citing *American Smelting & Refining Co. v. Occupational Safety & Health Review Commission*, 501 F.2d 504, 509 (8th Cir. 1974)). There was neither debate nor vote on the issue of separability, and no separability clause was included in the Act.

Additionally, while speaking in conclusional terms about intending the Alaskan exemption to be severable, Senator Long virtually admitted that Congress would not be satisfied with the Act if the exemption were severed. He notes that as a result of severance, Alaska would pay the same 30 percent tax as everybody else, but states "if that were to be the case we would expect to act in the future to remedy this and to try to provide some consideration based on the cost of transportation and the high cost of developing oil and producing oil in those areas north of the Arctic Circle, and those areas that are far removed from a pipeline or any kind of feasible water transportation." 126 Cong. Rec. S 3056 (daily ed. March 26, 1980).

As was shown above, even the government concedes that the ultimate test for separability is whether Congress would be satisfied with its enactment absent the provision sought to be severed. As the legislative history of the exemption shows, and as Senator Long admits, Congress would not have been satisfied with the Act absent the Alaskan exemption. This being the case, Congress, not the Court, should rewrite the Act in a manner that comports with constitutional requirements.

Indeed, the district court's recognition that severance in this case would amount to "judicial legislation which is not permissible and should be avoided by courts," provides an independently sustainable ground for refusing to cure the unconstitutionality of the Act by severing the Alaskan exemption. Memorandum Opinion, at 12 (reproduced in Jurisdictional Statement, at 10a). The dictum quoted by the government from *Utah Power & Light Company v. Pfost*, 286 U.S. 165, 185 (1932) (Jurisdictional Statement, at 25), notwithstanding,[10] the courts have been particularly reluctant to resort to severance where to do so would result in the extension of a statute by judicial decree. As was stated in *U.T., Inc. v. Brown*, 457 F.Supp. 163, 170 (W.D. N.C. 1978):

> It is a cardinal rule of construction that where an excepting clause or restriction is found unconstitutional the substantive provisions it qualifies cannot stand. (Authorities omitted.) The court will not assume that the legislative body would have enacted the ordinance without the exceptions, nor can the court determine how the substantive provisions of the ordinance might otherwise have been modified had it been known the exceptions would be found unconstitutional.

*See generally Sutherland* § 44.13, at 359 (and cases cited therein).

Similarly, in *Davis v. Wallace*, 257 U.S. 478, 42 S.Ct. 164 (1922), the plaintiffs argued that North Dakota's special excise tax could not be assessed against them on the basis of the general computation scheme because the excepting provision that governed computation of the tax

[10] Even according precedential value to the dictum in the *Pfost* case, the Act at issue here is not simply a revenue statute, but rather, as the government itself points out, it was the result of a delicate balance between the competing objectives of raising revenue and providing incentives for domestic oil production.

as to them had been declared unconstitutional. This Court agreed, stating:

> Here the excepting provision was in the statute when it was enacted, and there can be no doubt that the Legislature intended that the meaning of the other provisions should be taken as restricted accordingly. Only with that restricted meaning did they receive the legislative sanction which was essential to make them part of the statute law of the state; and no other authority is competent to give them a larger application.

42 S.Ct. at 166. *See McCorkle v. United States*, 559 F.2d 1258 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978) (the severance of a limiting provision almost always alters the meaning and effect of the statute, and for this reason, has been criticized as amounting to "judicial legislation").

This reluctance of the courts to legislate judicially through severance comports with the general rule that courts will avoid substituting their judgment for that of the legislature. *See, e.g., Kleppe v. New Mexico*, 426 U.S. 529, 96 S.Ct. 2285, 2292 n.10 (1976); *Twentieth Century-Fox Film Corp. v. Winchester Drive-In Theatre, Inc.*, 351 F.2d 925, 929 (9th Cir. 1965), *cert. denied*, 382 U.S. 101 (1966). Thus, in *United States v. General Douglas MacArthur Senior Village, Inc.*, 470 F.2d 675 (2d Cir. 1972), *cert. denied*, 412 U.S. 922 (1973), the court refused to extend the scope of a statute regarding the ranking of federal tax liens, stating:

> [W]here Congress has considered proposals of a highly qualified committee and has enacted specific, carefully-tailored legislation, it would be inappropriate for a court to undertake piecemeal extensions of the principles reflected in this legislation merely because it is desirable, especially in view of the fact that Congress saw fit to provide for these extensions.

470 F.2d at 679. The court concluded that the soundest approach was to look to Congress for resolution.

Similarly in this case, the only remedy which will avoid judicial expansion is the one adopted by the district court. In view of the legislative history of the exemption and the purposes sought to be achieved by the detailed balancing in the Act, there is no substantial question but that the district court's decision is correct. That Congress wanted to impose a tax on so-called windfall profits does not alter the fact that it chose this specific act with all of its qualifications and restrictions. While the government alludes to the fiscal consequences of striking the entire tax, these consequences need not be severe if Congress acts quickly to pass a constitutional program. Indeed, by summary affirmance of the district court's decision in this case, the consequences can be minimized even further. On the other hand, failure to develop oil production in Alaska to its full potential—the result Congress wished to avoid—may have long range consequences for the nation's energy supply.

## CONCLUSION

The decision of the district court should be summarily affirmed, there being no substantial question as to the correctness of that decision.

Respectfully submitted,

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ATTORNEYS FOR THE
STATE OF LOUISIANA

# APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

NO. C80-0302

JOHN PARTRIDGE, HARRY PTASYNSKI,
BERTON W. AVERY, GOLDIE AVERY,
FREDERICK S. JOHNSON and
CALVIN PETROLEUM,

Plaintiffs

v.

UNITED STATES OF AMERICA,

Defendant

STATE OF TEXAS, STATE OF
LOUISIANA, INDEPENDENT
PETROLEUM ASSOCIATION OF
AMERICA, et al.

Intervenors

## BRIEF FOR THE DEFENDANT IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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3. *Legislative History*

As evidenced by the name, the Act was enacted for the purpose of taxing the windfall profits to be realized by oil producers occasioned by the decontrol of oil. "The Crude Oil Windfall Profit Tax Act of 1979 is needed because of the Administration's decision to phase out price controls on crude oil, the recent increases in world oil prices, and the nation's continuing overdependence on imported energy." S. Rep. No. 96-394, 96th Cong., 1st Sess. at 6 (1980-3 Cum. Bull. 131, 142). The Congressional Record is replete with similar references. Thus,

> This windfall profit tax bill imposes a windfall profit tax on domestic oil producers and royalty owners to offset the decontrol of domestic oil prices implemented by the President.

125 Cong. Rec. S18863 (daily ed. Dec. 17, 1979).

> The situation before us is oil. The situation before us is the suddent [sic] enormous increase in profits as a result of the decontrol of oil. The issue before us is the enormous consequences that these huge additional revenues will have for the rest of the United States, for the rest of the country, for those States which are not so fortunate as to be oil producers.

125 Cong. Rec. S18470 (daily ed. Dec. 13, 1979).

A secondary purpose of the Act was to encourage the development of this country's petroleum resources.

> We have attempted to fashion a windfall tax which will promote the exploration, development and production of domestic petroleum resources, while remaining cognizant of the heavy burden imposed on the American people by the rapidly escalating costs of energy. This legislation has

> been shaped under the shadow of our continued dangerous dependence on foreign oil.

125 Cong. Rec. S18863 (daily ed. Dec. 17, 1979).

Needless to say, the Act was a result of compromise and very careful balancing of a variety of national interests and problems.

> While a windfall profits tax would reduce the large revenue gains received by U.S. oil producers, it could also curtail the producers' incentives to explore and produce more oil. Consequently, such a tax should strike the appropriate balance between tax receipts that could be used for public investment or redistribution and industry incentives to increase domestic oil production. By placing relatively high tax rates on oil that would have been produced under controlled prices and relatively low rates on oil that is only marginally profitable at world prices, this balance may be achieved.

125 Cong. Rec. S16864 (daily ed. Nov. 16, 1979).

> It is often said that politics is the art of compromise. Nowhere was that more evident than in the extended negotiations among Senators which took place over the past several weeks. The Finance Committee bill was viewed as a good starting point by many, but substantial increases in the revenues to be raised by the tax were strongly urged by a number of Senators. Others, just as vigorously, opposed any increase in revenues and, in fact, contended that oil production would be stifled by any tax. This bill reflects a balance between those conflicting viewpoints, hammered out in the truest sense of compromise.

125 Cong. Rec. S18863 (daily ed. Dec. 17, 1979).

The Act is a manifestation of Congress' monumental effort and determination to fashion a tax that would, in balance, be as equitable as possible avoiding unfair discrimination against a particular region, and, thereby, achieve "substantial uniformity within the meaning and purpose of the Constitution." *Head Money Cases, supra*, 112 U.S. at 595.

A careful review of the Act and its legislative history reveals that Congress made an exhaustive examination of relevant economic circumstances in the course of determining upon what oil production the tax would be levied and to what degree. For example, Congress considered the impact on big oil companies, independent oil producers and royalty owners, states that produce oil and those that do not, consumers of oil—particularly those located in states not so fortunate as to be oil-producers—overall production of oil and production of different types of oil, *e.g.*, newly discovered oil—

> incremental oil from tertiary recovery techniques (technologies that use heat or chemical compounds to produce additional oil from a reservoir), heavy oil (a highly viscous oil that generally requires additional effort to produce), and the first 1,000 barrels per day of "stripper" oil (oil from wells that have produced 10 or fewer barrels per day for at least a year) produced by independent producers.

125 Cong. Rec. S16864 (daily ed. Nov. 16, 1979). See also 125 Cong. Rec. S17193-S17195 (daily ed. Nov. 26, 1979). S17399, S17422 (daily ed. Nov. 28, 1979), S17715 (daily ed. Dec. 4, 1979), S18054, S18055 (daily ed. Dec. 7, 1979), S18185, (daily ed. Dec. 11, 1979), S18286, S18298 (daily ed. Dec. 12, 1979), S18465, S18470 (daily ed. Dec. 13, 1979).

It must be emphasized that the rationale underlying the treatment accorded the aforementioned special interests and the exempt Alaskan oil in the Act is the same,

*i.e.*, consideration of costs of production, economics, the desire to provide incentives for production, etc. Also, none of the oil produced in Alaska during the period in question is exempt under the Act. In any event a substantial portion of oil produced in Alaska is and will be subject to the windfall profits tax.

Further, it is important to note that the Act exempts oil production in other states as well as a limited amount of Alaskan production, (see Code Sec. 4994(c), Appendix, *infra*, Front-end Tertiary Oil), in order to ensure that the tax "operates with the same force and effect." *Head Money Cases, supra*, 112 U.S. at 594. This is merely a recognition by Congress of the unique circumstances attendant to the exempt production (discussed, *infra*). Failure to provide for such exemptions as Code Section 4994 (c) and (e) would have the force and effect of unfair discrimination against the affected regions as well as discouraging development of these petroleum reserves.

Another prime example of the manner in which Congress accomplished an equitable balancing of a variety of interests is found in a comparison of the exemption accorded particular Alaskan oil production (Code Sec. 4994(e)) and the very favorable treatment given to independent oil producers,[5] *e.g.*, the low tax rates applicable to independents' oil production, Code Section 4992 (26 U.S.C.), and their tax exemption for the production of certain oil. Code Sec. 4994 (c)(1). The enactment of tax legislation containing special benefits for independent oil producers is, taken in isolation, unfair to Alaska. This discrimination occurs because there are no independent oil producers operating in Alaska.

> There are no independents doing business in Alaska. There are no independents in Alaska.

[5] Which was dramatically increased by the Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172, effective August 13, 1981.

> Those are all majors. As a result of the Bentsen amendment, independents were eliminated. So this becomes an anti-Alaska tax.

125 Cong. Rec. S17478 (daily ed. Nov. 29, 1979). There are no independent producers in Alaska because of the extraordinarily high cost of production.

> Let me [Senator Stevens] say again independents are not in my State. They cannot afford to operate in Alaska. They do not have any money left with these advantages the Senator is talking about to finance a well that will cost up to $42 million.

125 Cong. Rec. S17810 (daily ed. Dec. 5, 1979), S18125 (daily ed. Dec. 10, 1979).

However, when the Act is viewed broadly, it is obvious that Congress took into account special factors and circumstances that affect production by independent oil producers just as they did when they considered the extreme conditions peculiar to the production of oil in Alaska. See, *e.g.*, 125 Cong. Rec. S17193-S17195 (daily ed. Nov. 26, 1979) and 125 Cong. Rec. S17728, S17729 (daily ed. Dec. 4, 1979), for discussions regarding independent oil producers. It is likewise clear from the legislative history that Congress considered the production of oil in Alaska as a unique problem to be resolved in a rational manner. Such authority is found throughout the legislative history of the Act, which is replete with references to the distinctive nature of oil production in Alaska.

> Alaskan oil sells at the wellhead for about $8-$9 less than the price of uncontrolled oil in the lower 48 States.
>
> *　　*　　*　　*　　*
>
> This exemption [for certain Alaskan oil] is intend-

> ed, in part, to eliminate the possibility of creating a disincentive for the production of Alaskan oil, and in apparent recognition of the large disparity between the wellhead price of oil produced north of the Arctic Circle and its actual refinery selling price.

Joint Committee, 96th Cong. 1st Sess. at 21, 22, The Design of a Windfall Profit Tax. Through the course of committee hearings and debates, the problems in developing Alaskan oil were continually reiterated:

> The exemption of Alaskan North Slope oil is based on the economies of Alaskan production.

*House Hearings before the Committee on Ways and Means on Windfall Profits Tax and Energy Trust Fund,* 96th Cong., 1st Sess. at 18 (1979) (statement by Secretary Blumenthal). See also House Hearings, *supra* at 27.

> It is generally agreed that there is a greater degree of risk in exploration and development in frontier areas, such as the Alaska North Slope than there is in the traditional lower 48 oil exploration. Major factors contributing to these increased risks are severe weather conditions, remoteness, sensitive environmental and geological characteristics, and a lack of normal social and industrial infrastructure.

125 Cong. rec. S16327 (daily ed. Nov. 8, 1979).

> The fact that this oil [Alaskan Cook Inlet] is produced offshore in severe aquatic and climactic conditions, which, considered together with the extra expenses of labor and supplies in Alaska, make this some of the most expensive oil to produce in the United States.

125 Cong. Rec. S17707 (daily ed. Dec. 4, 1979).

> In view of the increased uncertainty of the Iranian oil supply, as well as that of the entire Mideast, we must insure that we do not discourage production of domestic oil from known domestic resources.
>
> In particular, the Cook Inlet of Alaska has resources which will be prematurely abandoned unless corrective action is taken to modify present economic disincentives.

125 Cong. Rec. S18111 (daily ed. Dec. 10, 1979). See also 2 *Senate Hearings before the Committee on Finance on Crude Oil Tax,* 96th Cong., 1st Sess. at 217-253 (see especially comparative charts at 238-241).

The exemption of a portion of Alaskan oil production merely emphasizes the concern of Congress that imposition of the tax on certain Alaskan production would make it less likely that the state's resources would be developed fully. In fact this concern prompted a majority, if not all, of the Act's exemptions.

> The test for exemptions found in the bill to date is a very simple test and it has to do with production effects of the exemptions. That is to say, that over and over again it was argued in the Finance Committee and on the floor of the Senate that this exemption or that exemption is justified because it relates to national energy policy, that, if the Federal Government foregoes revenues by the exemption route on certain types of oil, those exemptions will be justified by production effect on types of oil that are thought to be sensitive to the taxation on its production.

125 Cong. Rec. S18651 (daily ed. Dec. 15, 1979). See also 125 Cong. Rec. S17399, S17422 (daily ed. Nov. 28, 1979); H.R. Conf. Rep. No. 96-817, 96th Cong., 2d Sess. at 103 (1980-3 Cum. Bull. 245, 263).

Congress devoted a great deal of effort and debate to devise a way to make certain that the contemplated excise tax would not act as a disincentive to oil production in Alaska and, thus, when considered in the context of all production, have a uniform force and effect on such production. It is of great significance that Congress rejected available alternatives to the method finally adopted to resolve the dilemma presented by the characteristics unique to the production of Alaskan oil, *i.e.*, partial exemption. Note that under the Act:

> All taxable oil is classified into one of several tiers. The structure of the tax is essentially the same for all tiers: the tax equals the tax rate times the taxable windfall profit, which equals the selling price of the oil minus an adjusted base price and minus a deduction for State severance taxes on the windfall profit. The tiers differ in the tax rate which is applied, in the adjusted base price which is used, and in some other respects.

H.R. Conf. Rep. No. 96-817, *supra* at 92 (1980 Cum. Bull. at 252). Code Sec. 4988(a), Appendix, *infra.* Obviously, a crucial factor in the computation of tax due is the "adjusted base price." The adjusted base price for a barrel of crude oil is the statutory base price as increased by inflation. Code Sec. 4989, Appendix, *infra;* Temporary Excise Tax Regulations Under the Crude Oil Windfall Profit Tax Act of 1980, Sec. 150.4989-1(a), Appendix, *infra.*

One possible solution Congress chose not to utilize was to assign the ultimately exempt Alaskan oil such a high base price that, as a practical matter, virtually no profit would be realized under of the Act and, therefore, no tax due on such oil.

> The committee made some progress in the treatment of Alaskan North Slope crude oil when it voted to increase the base price at which the tax would begin to apply. The committee rejected

> the better solution of exempting Arctic oil from the tax altogether and as a result of that decision as much as 3 billion barrels of reserves may remain in the ground because at the lower price they will be uneconomic.

125 Cong. Rec. S16327 (daily ed. Nov. 8, 1979). See also 125 Cong. Rec. S17479, S17480 (daily ed. Nov. 29, 1979), S17706, S17715 (daily ed. Dec. 4, 1979), S18111 (daily ed. Dec. 10, 1979), S18564 (daily ed. Dec. 14, 1979).

Another option was to allow a tax credit for qualified oil and development costs in Alaska. This alternative was offered by Senator Stevens on December 10, 1979, in the form of "Amendment No. 712 (Purpose: To create exploration, development, and production incentives by allowing a tax credit for windfall profit taxes expended on qualified oil and gas development costs in Alaska)" (125 Cong. Rec. S18125 (daily ed. Dec. 10, 1979)), and rejected on the same date (125 Cong. Rec. S18137 (daily ed. Dec. 10, 1979)).

Instead, in enacting the Alaskan exemption, Congress opted for a shorthand way of exempting oil produced in areas subject to severe climactic conditions, where the costs of production are high and where Congress desired to encourage production. In giving preference to the exemption approach rather than the credit or adjusted base price alternatives, Congress obviously was motivated by considerations of ease and cost of administration and reporting for all concerned as well as plain old common sense. This was acknowledged by Secretary of the Treasury Blumenthal when testifying on the Act. "It is easier to exempt Alaskan production from the tax than to require Alaskan producers to file tax returns solely for the purpose of showing that no liability has been incurred." *House Hearings, supra* at 19. Consequently, an inestimable amount of time-consuming, wasteful paperwork has been avoided by Congress' adoption of the location exemption.

To attack Congress' utilization of the location ex-

emption to achieve a resolution of complex problems and a balancing of regional interests as a violation of the Uniformity Clause is to place form over substance. The legislative history of the Act provides irrefutable evidence that Congress, after an exhaustive investigation into the relevant economic circumstances and potential impact of the tax on the nation from an economic and energy point of view, opted for, among others, a location exemption as the most equitable way of ensuring that the Act was imposed with "substantial uniformity within the meaning and purpose of the Constitution." *Head Money Cases, supra,* 112 U.S. at 595. Nor could it be suggested that the Act, particularly the Alaskan exemption, resulted from a coalition of a majority of states intent upon discriminating against another state or region. J. Story, *Commentaries on the Constitution of the United States, supra.* The latter point is emphasized by the fact that only the production of oil from certain areas of the state is exempt, and not all of the oil produced in the state.

Further, the quandary posed by oil production in Alaska, which is clearly distinguishable from other domestic production[6], is precisely the type of situation

[6] Indeed it is evident that, in view of extreme climactic conditions, oil production in Alaska is so dissimilar from other domestic production that it amounts to a different article entirely in the context of the tax. Thus, there can be no comparison for purposes of the uniformity requirement, *e.g.*, the fact that oil subject to Arctic conditions is not found in Texas results in no greater lack of uniformity than does the absence of tobacco crops in many nothern states. *Head Money Cases, supra.* As said by the Supreme Court in *Florida v. Mellon,* 273 U.S. 12, (1927), rejecting an argument that the federal estate tax was unconstitutional because Florida imposed no state death tax which could be utilized for credit as did most other states:

> The criterion that the federal tax is not uniform because other states impose inheritance taxes while Florida does not is without merit. Congress cannot accommodate its legislation to the conflicting or dissimilar laws of the several states nor control the diverse criteria to be found in the various states which necessarily work unlike results from the same tax. All that the Constitution Art. 1, Sec. 8, cl. 1, requires is

contemplated by the Supreme Court in *Regional Rail Reorganization Act Cases, supra,* 419 U.S. 102 (1974). The reasoning applied in that decision is equally applicable here. As was the Regional Rail Reorganization Act of 1973, the Act's Alaskan exemption is a carefully considered response to a specific problem of significant proportion. To effectuate its goal of preventing undue concentration of incredible sums of money in the hands of oil producers at the expense of the citizenry and, at the same time, offering an inducement to exploration and development of oil resources situated in outlying regions of severe climactic conditions, Congress was forced to implement some sort of distinction. As in the *Regional Rail Reorganization Act Cases,* the object of the legislation was, by necessity, a geographic one. Just as the problems with the railroads in the northeast were peculiar to that region, so is the problem with development of Alaskan oil peculiar to that region. Put simply, operating railroads in the northeast is not the same as in the rest of the country, and developing oil resources in Alaska is not the same as in the lower 48 states.

It cannot be legitimately contended that Congress is constitutionally prohibited from allowing a tax exemption based on the harsh and inhospitable conditions under which Alaskan oil is produced. The mere fact that Congress chose to frame that exemption in terms of the particular geographic area in which those conditions occur does not compel a contrary conclusion. Indeed, the fact that Congress did subject existing Alaskan oil production to the imposition of a windfall profits tax should

(Footnote 6 continued)

> that the law shall be uniform in the sense that by its provisions the rule of liability shall be alike in all parts of the United States.

We do not understand either Louisiana or Texas to contend that some oil will also be produced in their states under frigid developmental conditions and, therefore, they have not shown that producers under their jurisdictions will be subject to discriminatory liabilities.

demonstrate without more that the tax was intended to be uniform in its application to all affected states.

To sum up, it is inconceivable that the framers of the Constitution intended it to operate in an inflexible, non-responsive manner, thus acting as a stranglehold on the power of Congress to deal effectively with the nation's increasingly complex, growing needs in an ever-changing world. Not even the brilliant individuals responsible for the Constitution could have foreseen the extent to which their infant nation would grow in size or industrialization and its concomitant dependence on oil, that a faraway arctic region to be known as Alaska would be a treasure trove of oil or that the production of oil in Alaska would be so extraordinarily difficult and expensive. It is just this type of situation that Alexander Hamilton must have had in mind when he acknowledged that, inasmuch as the needs and wants of a society could not be imagined, much less calculated, a Constitution should not set limits to a nation's resources if it is expected to survive. 2 Elliot's Debates 351 (2d ed.), *supra.* Clearly, a cardinal principle of judicial construction is that the Constitution was intended to be a flexible, sensitive instrument capable of adaptation. *Regional Rail Reorganization Act Cases, supra.*

Finally, the Constitution provides specific guarantees of rights and limits on Government power in a wide range of situations, principally to protect against the tyranny of a majority. The uniformity requirement is one such limit. The protection of rights and interests otherwise is conferred upon the political process. Where, as here, Congress does not impose a geographically non-uniform tax on a few states, but instead a blanket tax applicable everywhere, with the only colorably geographic distinction being a limited exemption operative in part of a relatively undeveloped non-contiguous single state, the political process protects the nation from potential injustice. The people's representatives making up the constitutionally required majorities of Congress have chosen here to make limited allowances for a remote geographic area due to uni-

que, extraordinary circumstances bearing on the production of oil in that area. The majority has not conspired to enrich itself at the expense of a few, but to assist a small part of the Union for the benefit of all. Thus, the policy underlying the uniformity requirement does not come into play in this case.

We respectfully submit that the foregoing demonstrates that the Act is substantially uniform "within the meaning and purpose of the Constitution", *Head Money Cases, supra* at 595, and, therefore, is constitutional.

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NO. 82-1066

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

UNITED STATES OF AMERICA, *Appellant*

V.

HARRY PTASYNSKI, *et al., Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

# MOTION OF APPELLEE THE STATE OF TEXAS TO AFFIRM

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NO. 82-1066

IN THE
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UNITED STATES OF AMERICA, *Appellant*

V.

HARRY PTASYNSKI, *et al., Appellees*

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF WYOMING

## MOTION OF APPELLEE THE STATE OF TEXAS TO AFFIRM

Pursuant to Rule 16 of the Rules of the Supreme Court, the State of Texas, an intervening plaintiff below and an appellee herein, moves for summary affirmance of the judgment of the United States District Court for the District of Wyoming that Title I of the Crude Oil Windfall Profit Tax Act of 1980, I.R.C. §§4986-4998 ("the Tax"), violates article I, section 8, clause 1 of the United States Constitution ("the Uniformity Clause"). The questions on which the decision of the cause depends are so insubstantial as not to require further argument.

## STATEMENT

Since the Memorandum Opinion, Amended Judgment, text of the Tax and text of the Uniformity Clause are included as appendices in the federal government's Jurisdictional Statement, these attachments are not reproduced herein.

The motions filed by the other appellees have fully set out a description of the proceedings below. The federal government has noted the potential magnitude of the amounts at stake in this action. *See* J. S., 8. The loss of revenues accruable to the government under the Windfall Profit Tax Act, however, cannot eclipse the question of the tax's constitutionality.

The courts have construed the Uniformity Clause to compel nothing more and nothing less than geographic uniformity. Appellee the State of Texas, as one of the states which the Constitition protects from excises that discriminate unfairly and injuriously, has a special interest in seeing that the integrity of the Uniformity Clause is preserved by the affirmance of the District Court's judgment.

## ARGUMENT

From the earliest case construing the Uniformity Clause through the present, the words "uniform throughout the United States" have been held to mean strictly geographic uniformity. By excluding exempt Alaskan oil from taxation, the Windfall Profit Tax Act creates classifications based solely on the geographical location of the tax's subject and thus is unconstitutional. Case law has not made an exception where a tax that is geographically non-uniform was legislated by a congressional majority in favor of a minority. Similarly, no court has construed the Uniformity Clause to permit deviation from geographical uniformity on grounds that

non-uniformity is justified by rational considerations, and, indeed, to do so would render the Clause meaningless. That Congress could have effected results similar to those it sought by establishing classifications based on a defined class of taxpayers or a particular subject of taxation is also immaterial. The Tax, by exempting Alaskan oil strictly on the basis of the geographical location of its production, violates the Constitution.

Severance of the constitutionally infirm provision to save the Tax is, in this instance, inappropriate. The general separability clause of the Internal Revenue Code should not be applied to sever the exempt Alaskan oil provision. Whether severance of the Alaska exemption is proper is a determination which must be made by looking to the entirety of the Tax's legislative history. That history confirms that the Alaska exemption was integral to the political compromise necessary for passage of the Tax. The Alaska exemption was also integral to Congress' attempt to balance the Windfall Profit Tax Act's generation of tax revenues against incentives to encourage domestic oil exploration and production. Severance of the Alaska exemption and the resulting extension of the excise to the production which Congress believed should be protected would disrupt that careful balance and constitute improper judicial legislation.

## A. THERE IS NO SUBSTANTIAL QUESTION AS TO THE CORRECTNESS OF THE DISTRICT COURT'S HOLDING THAT THE TAX VIOLATES THE CONSTITUTIONAL REQUIREMENT OF UNIFORMITY.

Article I, section 8, clause 1 of the United States Constitution provides:

> The Congress shall have Power to lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the Common Defense, and General Welfare of the United States; *but all* Duties, Imposts, and *Excises, shall be uniform throughout the United States.* (Emphasis added.)

The Windfall Profit Tax Act imposes, by its own terms, an excise tax. *See* I.R.C. §4986(a). As the federal government has noted, the excise is imposed on the activity of mineral extraction, specifically the production of crude oil. *See* J. S., 14-15, n. 22. The Uniformity Clause compels that the tax operate with the same force in every place where the subject of the tax—that is, the production of domestic crude oil—is found. Yet the Tax provides at Section 4991 that "exempt Alaskan oil" is not taxable, thus blocking the operation of the excise on certain production of oil solely on the basis of its geographic location. The exemption of Alaskan oil is, on its face, unconstitutional.

It is not the fact that more oil is produced in Texas than in Vermont which makes the tax non-uniform. To hold a tax invalid on this basis would imply a requirement of "intrinsic" uniformity. The courts have consistently rejected this interpretation of the Uniformity Clause and instead have required "geographic" uniformity. Thus, what renders the tax non-uniform is the different treatment of oil produced in different states.

The Supreme Court has required strict enforcement of the uniformity limitation, as demonstrated through an unbroken line of cases beginning in 1796 with *Hylton v. United States,* 3 U.S. (3 Dall.) 171 (1796). In that case, Justice Paterson, who was a delegate to the Constitutional Convention, observed that the Clause by its very certainty and simplicity was intended to appease states' fears that other states might not have to participate in

the "mutual sacrifices and concessions" of nation taxation. *Id.*, 175-78. In the *Head Money Cases, sub. nom. Edye v. Robertson,* 112 U.S. 580 (1884), this Court noted that a "tax is uniform when it operates with the same force and effect in every place where the subject of it is found." *Id.*, 594.

In *Knowlton v. Moore,* 178 U.S. 41, 20 S.Ct. 747 (1900), the Court's analysis of the history of the adoption of the Constitution led to the conclusion that the words "uniform throughout the United States" mean simply geographic uniformity. The Court recognized that the Articles of Confederation had paralyzed the Continental Congress by failing to empower the government to enforce taxes necessary to sustain its needs. As the Continental Congress struggled to overcome this problem, the only question concerning restraint of the proposed taxing power was its operation upon the respective states. Moreover, "[t]he proceedings of the Continental Congress also make it clear that the words 'uniform throughout the United States,' which were afterwards inserted in the Constitution of the United States, had, prior to its adoption, been frequently used, and always with reference purely to a geographical uniformity." *Id.*, 769. Debate of a similar nature took place at the Constitutional Convention, where the delegates finally subjected Congress' power to levy duties, imposts and excises "to the requirement of uniformity throughout the United States, these words . . . having acquired at that time an unquestioned meaning." *Id.*, 771. Subsequent decisions have consistently upheld this *per se* application of the Uniformity Clause to require geographic uniformity. *See La Belle Iron Works v. United States,* 256 U.S. 377, 392-393 (1921); *Bromley v. McCaughn,* 280 U.S. 124 (1929); *Fernandez v. Wiener,* 326 U.S. 340 (1945).

The federal government claims that the Uniformity Clause was intended to stop Congressional "combina-

tions" that might injure the "vital interests" of one region. *See* J. S., 14. In similar fashion, the federal government suggests that the constitutional requirement for uniformity merely prevents "combinations" from passing tax legislation preferential to their own states or oppressively discriminatory as to a congressional minority. *Id.*, 17. Certainly the object of the Uniformity Clause is to protect the states from unfair, discriminatory acts by Congress. *See Downes v. Bidwell*, 182 U.S. 244, 278 (1901). There is, however, no indication in the case law that the strong protection for states' interests embodied in the Uniformity Clause was meant to be diluted by allowing preferences approved by a large majority of states, or discriminations involving something other than "vital interests," or any other vagaries of judicial interpretation. The uniformity requirement is phrased in absolute terms.

The federal government submits that the inquiry into the legitimacy of the Alaska exemption cannot be separated from the question whether the exemption is supported by rational considerations. Even assuming the reasonableness of congressional concerns in drawing the Alaska exemption and the relationship of the exemption to those concerns, the Uniformity Clause functions as a strict prohibition against establishing excise tax rates or exemptions based solely on geography, *regardless* of the reason. There is no jurisprudence construing the constitutional requirement for uniformity so narrowly as to permit geographic non-uniformity where the absence of uniformity is "justified" by some rational basis. To apply the rational relation test to the Uniformity Clause would render the clause superfluous.

Finally, the federal government argues that Congress could have excluded from taxation the production covered by the Alaska exemption by phrasing the exemption in terms of extreme climatic conditions and suggests that the Tax should not be held unconstitu-

tional on the basis of technical errors in congressional draftsmanship. *See* J.S., 20. As noted in the Motion of Taxpayer and Association Appellees to Affirm, if Congress has a real concern about the adverse impact of the tax on crude oil production in harsh environments, it may prescribe general exemptions not only for oil produced at specified low temperatures, but also for oil produced under other marginal conditions which incur high costs. Such exemptions, however, would have to apply anywhere the defined climatic conditions exist, not just within the state of Alaska.

In *Railway Labor Executives Assn. v. Gibbons*, 455 U.S. 457 (1982), the Court dealt with a challenge to bankruptcy legislation which is closely analogous to appellees' challenge of the Tax. At issue were provisions of the Rock Island Transition and Employee Assistance Act, Pub. L. No. 96-254, 94 Stat. 399 ("RITA"), regarding certain protection arrangements for employees of the bankrupt Rock Island Railroad. Just as the Windfall Profit Tax Act provides for tax relief strictly on the basis of geographic location rather than on the basis of a defined class of taxpayers or production problems, RITA covered one particular problem of one bankrupt railroad rather than addressing a defined class of debtors. Just as rational considerations are offered to validate the Alaska exemption despite its unconstitutionality, the crisis which precipitated enactment of RITA was offered as sufficient reason to disregard its constitutional infirmities. The Court held that a law must apply uniformly to a defined class of debtors in order to pass scrutiny under article I, section 8, clause 4 of the Constitution, the requirement for uniformity in bankruptcy laws, and that RITA did not survive such scrutiny.

Excise taxes, like bankruptcy statutes, must be uniform. When the uniformity requirement applies, no rational relationship test or other interpretations sug-

gested by the federal government may justify deviation therefrom.

## B. THERE IS NO SUBSTANTIAL QUESTION AS TO THE CORRECTNESS OF THE DISTRICT COURT'S HOLDING THAT THE INVALIDITY OF THE "ALASKAN OIL EXEMPTION" RENDERED THE ENTIRE TAX INVALID.

The federal government argues that the general separability provision of the Internal Revenue Code of 1954, I.R.C. §7852(a), should be applied to preserve all of the taxing provisions of the Windfall Profit Tax Act that are "unaffected" by the invalid provisions. J.S., 21. Section 7852(a) provides that "[i]f any provision of this title, or the application thereof to any person or circumstances, is held invalid, the remainder of the title, and the application of such provision to other persons or circumstances, shall not be affected thereby." This clause originated in the 1918 Revenue Act, at which time the income tax law was literally re-enacted by each successive Congress. The purpose of the clause there was to prevent the nation from being left without a taxing statute between sessions of Congress in the event one part of the statute was held invalid. The separability clause was never intended to save a single provision of the Internal Revenue Code if an integral element of that provision has been found unconstitutional. In any event, the court below did not rule that Section 7852(a) is not applicable, but rather noted that "its aid in clarification of this matter is minimal" and that "a holding can be reached without reliance on or disaffirmance of the clause." Memorandum Opinion, 11.

Even if Section 7852(a) *is* used to aid in clarification of the separability issue, it is merely an aid, not "an inexorable command." *Dorchy v. Kansas*, 264 U.S. 286, 290

(1924). The existence of a separability clause simply shifts to the statute's challenger the burden of showing the provisions' inseparability. Whether the presumption favors the statute's challenger or its advocate, in every case the determination of separability is to be made by looking to the intent of the lawmakers. *Carter v. Carter Coal Co.*, 298 U.S. 238, 312 (1936). A fair approach to solving the problem is to suppose that while that bill was pending in Congress, a motion to strike the provisions later held invalid had prevailed. One should then inquire whether Congress, notwithstanding, probably would not have passed the other provisions of the proposed legislation. *Id.*, 313. Whether elimination of the constitutionality infirm provisions would alter the substantive reach of the statute and leave completely unchanged its basic operative structure is also determinative. *See United States v. Jackson*, 390 U.S. 570, 586 (1968).

The federal government argues that Senator Russell Long's statement that the excise will apply to Alaska, should the exempt Alaskan oil provision be invalidated, is representative of Congressional intent, since no contrary views were expressed. *See* J.S., 23-24. Although Senator Long's statement indicates his opinion on the separability issue, it is not indicative of the sentiment of the entire Congress on this question. Legislative history shows that Senator Long was the only member of Congress who voiced support of an extension of the tax to Alaska in the event the Alaska exemption was invalidated. There was neither discussion nor a vote upon separability of the Alaska exemption.

The federal government claims that legislative history indicates that Congress did not consider the deterrent effect of a windfall profit tax on the development of Alaskan oil so critical that it would have rejected the tax without the Alaska exemption. *See* J.S., 24. The legislative record, on the contrary, reflects the serious

concern of the members of Congress over extension of the tax to Alaskan oil. The House Ways and Means Committee approved a bill with an exemption for Alaskan oil produced north of the Artic Circle, except for the Sadlerochit reserves already in production. H.R. Rep. No. 304, 96th Cong., 2d Sess. 30, *reprinted in* [1980] U.S. Code Cong. & Ad. News 587, 612. The Senate Finance Committee bill exempted *all* newly discovered oil, including production covered by the Alaska exemption. S. Rep. No. 394, 96th Cong., 2d Sess. 35-37, *reprinted in* [1980] U.S. Code Cong. & Ad. News 410, 444-446. The amendment approved by the Senate majority extended the tax to newly discovered oil, but, like the Ways and Means bill, exempted Alaskan oil. This amendment resulted from extensive negotiations in which Senator Ted Stevens of Alaska, the minority leader, played a significant role. 125 Cong. Rec. S18564, S18566 (daily ed. Dec. 14, 1979). Senator Stevens stated his reluctant approval of the compromise and his firm opposition to any additional amendment which would increase the tax on Alaskan oil. 125 Cong. Rec. S18565 (daily ed. Dec. 14, 1979). In view of Senator Stevens' role in the negotiations, the Alaska exemption was an integral part of the political compromise needed to pass the bill. The District Court correctly ruled that "the Act as it exists today would not have been passed without the invalid Alaska provision." Memorandum Opinion, 11.

Aside from the political aspects of compromise in the legislation, Congress did not, as a policy matter, intend to tax the exempted Alaskan oil. As the federal government has observed, the primary objective of the windfall profit tax was to heavily tax "old" oil, whose production Congress believed was unlikely to increase as prices rose, and to impose a relatively low tax rate on "new" oil, whose production Congress believed would be responsive to price. *See* J.S., 10. In other words, Congress sought to balance the generation of tax revenues

against providing incentives to increase domestic oil exploration and production. The result of this delicate congressional balancing of interests is a complex statute. A critical element of this balancing effort is the Windfall Profit Tax Act's exemption of certain production, including Alaskan oil. To disrupt this balance by severing the Alaskan exemption and thereby extending the tax to Alaska would be to appropriate what is properly a legislative function.[1]

The policy against judicial legislation was aptly stated in *Davis v. Wallace*, 257 U.S. 478, 484-485 (1922):

> Where an excepting provision in a statute is found unconstitutional, courts very generally hold that this does not work an enlargement of the scope or operation of other provisions with which that provision was enacted, and which it was intended to qualify or restrain. ... Here the excepting provision was in the statue when it was enacted, and there can be no doubt that the Legislature intended that the meaning of the other provisions should be taken as restricted accordingly. Only with the restricted meaning did they receive the legislative sanction which was essential to make them part of the statute law...; and *no other authority is competent to give them a larger application.* (Emphasis added.)

1. The federal government has cited *Utah Power & Light Co. v. Pfost*, 286 U.S. 165 (1965), in support of its conclusion that the Tax, as primarily a revenue-raising measure, should be preserved despite the invalidity of a specific exemption. *see* J.S., 25. As pointed out in the Motion of Appellee the State of Louisiana to Affirm, the Dictum dited is not applicable in the instant case. The Windfall Profit Tax Act is not strictly a revenye-raiser, but rather balances the need for tax revenues against incentives to encourage domestic exploration and production.

*See also McCorkle v. United States,* 559 F.2d 1258 (4th Cir. 1977), *cert. denied,* 434 U.S. 1011 (1978). This reluctance to legislate by judicial fiat is particularly appropriate where Congress has passed "specific, carefully-tailored legislation." *United States v. General Douglas MacArthur Senior Village, Inc.*, 470 F.2d 675, 679 (2d Cir. 1972), *cert. denied,* 412 U.S. 922 (1973). (Hereinafter "*MacArthur Sr. Vill.*")[2] Only with the Alaska exemption and the resulting incentive to continue to explore for and produce Alaskan oil did the Tax pass, and no authority other than Congress is competent to give the excise larger application. Congress has amended its past actions, especially in energy matters, on many occasions and has, in fact, amended the very statute at issue here. It is solely within the province of Congress to amend the tax to conform with the Constitution, while pursuing the objectives of Congress' own design. The court below properly concluded that severance of the Alaska exemption and the resulting extension of the excise to all crude oil produced in Alaska would amount to impermissible judicial legislation.

2. The federal government suggests that, if the district court was justified in refusing to extend the tax to production subject to the Alaska exemption, it should have preserved that exemption by upholding the tax on "old" oil and exempting all "new" oil, including Alaskan production. Such gerrymandering is precisely what courts have avoided for the reason that "it would be inappropriate ... to undertake piecemeal extensions of the principles reflected in this legislation merely because it is desirable, especially in view of the fact that Congress saw fit not to provide for these extensions." *MacArthur Sr. Vill.* at 679.

## CONCLUSION

For the reasons set forth above, the decision of the District Court should be summarily affirmed, there being no substantial question as to the correctness of that decision.

Respectfully submitted,

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No. 82-1066

# In the Supreme Court of the United States

OCTOBER TERM, 1982

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UNITED STATES OF AMERICA, APPELLANT

*v.*

HARRY PTASYNSKI, ET AL.

---

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING*

---

**BRIEF FOR THE UNITED STATES**

---

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## QUESTIONS PRESENTED[1]

1. Whether the exclusion of certain geographically defined categories of Alaskan oil (26 U.S.C. (Supp. V) 4991(b)(3) and 4994(e)) from the coverage of the Crude Oil Windfall Profit Tax Act of 1980, violates the Uniformity Clause (Article I, Section 8, Clause 1) of the Constitution, which requires that "Duties, Imposts and Excises shall be uniform throughout the United States."

2. Assuming the answer to Question No. 1 is in the affirmative, whether the constitutionality of the remaining provisions of Title I of the Crude Oil Windfall Profit Tax Act should be upheld, pursuant to the separability clause of Section 7852(a) of the Internal Revenue Code of 1954.

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[1] Appellees are the taxpayers Harry Ptasynski, John Patridge, Berton W. Avery, Goldie Avery, Frederick S. Johnson, and the Calvin Petroleum Corporation.

Appellee-intervenors are the Independent Petroleum Association of America, American Association of Petroleum Landmen, Association of Oilwell Servicing Contractors, Eastern Kansas Oil and Gas Association, Liaison Committee of Cooperating Oil and Gas Associations, Arkoma Basin Independent Gas Producers Association, California Independent Producers Association, Illinois Oil and Gas Association, Indiana Oil and Gas Association, Independent Oil and Gas Association of West Virginia, Independent Petroleum Association of Mountain States, Kansas Independent Oil and Gas Association, Louisiana Landowners Association, Inc., Michigan Oil and Gas Association, New York State Oil Producers Association, Independent Oil Producers Tri-State, Inc., Independent Petroleum Association of New Mexico, Kentucky Oil and Gas Association, Louisiana Association of Independent Producers and Royalty Owners, National Stripper Well Association, North Texas Oil and Gas Association, Ohio Oil and Gas Association, Panhandle Producers and Royalty Owners Association, Pennsylvania Oil and Gas Association, Tennessee Oil and Gas Association, Virginia Oil and Gas Association, Oklahoma Independent Petroleum Association, Pennsylvania Grade Crude Oil Association, Permian Basin Petroleum Association, Texas Independent Producers and Royalty Owners Association, West Central Texas Oil and Gas Association, and the States of Texas and Louisiana (see J.A. 7-8, 13).

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# In the Supreme Court of the United States

OCTOBER TERM, 1982

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No. 82-1066

UNITED STATES OF AMERICA, APPELLANT

*v.*

HARRY PTASYNSKI, ET AL.

---

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING*

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## BRIEF FOR THE UNITED STATES

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### OPINION BELOW

The memorandum opinion of the district court (J.S. App. 1a-11a) is reported at 550 F. Supp. 549.

### JURISDICTION

Several of the appellees brought these suits in the United States District Court for the District of Wyoming, seeking a refund of windfall profit taxes, a declaratory judgment that the Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223, 94 Stat. 229 *et seq.*, is unconstitutional, and injunctive relief restraining the further assessment and collection of such taxes (J.A. 11-21). On November 4, 1982, the district court filed a judgment directing that appellees recover windfall profit taxes plus interest for the taxable periods in question in unspecified amounts to be later determined by the parties (J.S. App. 12a-13a). On November 12, 1982, the district court filed an amended order awarding judgment in favor of appellees in the amounts sought in the pleadings, with interest as provided by law, and also specifically setting forth the court's holding that the Crude Oil Windfall Profit Tax Act of 1980 is unconstitutional (J.S. App. 14a-15a). On November 15, 1982, the district court entered a further amended judgment order limiting its ruling of unconstitutionality to the provisions of

Title I of the Crude Oil Windfall Profit Tax Act (26 U.S.C. (Supp. V) 4986 to 4998 and related administrative provisions) (J.S. App. 16a-17a).[2]

On November 18, 1982, the United States filed a notice of appeal from all three judgment orders (J.S. App. 18a; J.A. III), and on February 22, 1983, this Court noted probable jurisdiction (J.A. 78). The jurisdiction of this Court rests on 28 U.S.C. 1252, which authorizes a direct appeal to this Court from an interlocutory or final judgment of a court of the United States holding an Act of Congress unconstitutional in a civil action to which the United States is a party.[3]

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 8, Clause 1 of the United States Constitution is set forth at J.S. App. 19a. Title I of the Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223, 94 Stat. 229 *et seq.*, and Section 7852(a) of the Internal Revenue Code of 1954 (26 U.S.C.) are set forth at J.S. App. 20a-63a.

## STATEMENT

### A. *The Statute*

On April 2, 1980, the President signed into law the Crude Oil Windfall Profit Tax Act of 1980. Title I of that Act, 94 Stat. 230 *et seq.*, added Sections 4986 through 4998 to the Internal Revenue Code of 1954 (26 U.S.C. (Supp. V)) together with related administrative provisions.[4] Under Title

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[2] The order dated November 12, 1982, appears to have been withdrawn and replaced with the November 15 order before it was entered on the court's docket sheets (J.A. III).

[3] Although the judgment order of November 4, 1982, appears to have been interlocutory, the orders of November 12 and November 15, 1982, were final judgments because they determined the specific amounts to be refunded as sought in the pleadings and they contain the requisite determination that there is no just reason for delay in the entry of final judgment on the claims addressed. See Fed. R. Civ. P. 54(b). At all events, all three orders are appealable to this Court under 28 U.S.C. 1252. See *United States* v. *Clark*, 445 U.S. 23, 25-26 n.2 (1980).

[4] Title II of the Act, 94 Stat. 256 *et seq.*, provides for various energy expenditure and investment credits, unconventional fuel production

I of the Act, an excise tax is imposed (subject to certain exemptions) on the "windfall profit" derived from the production of domestic crude oil after February 29, 1980 (Sections 4986(a) and 4991(a)).[5] The "windfall profit" subject to the tax is determined (on a per barrel basis) by reference to the difference between the "removal price" (generally the price at which the oil is sold at the wellhead) and an "adjusted base price" reflecting, with certain adjustments, the price at which such oil would have been sold in 1979, under varying assumptions applicable to different categories of oil (Sections 4988(a), 4988(c) and 4989)).[6] An offset is allowed, however, for state severance taxes attributable to the value of the oil in excess of its "adjusted base price" (Sections 4988(a) (2) and 4996(c)). Finally, in no event can the taxable

credits, energy related uses of tax-exempt bonds, and special income tax deductions for "tertiary injectant expenses." Title III of the Act, 94 Stat. 288 *et seq.*, provides for energy assistance for certain low income households, and Title IV, 94 Stat. 299 *et seq.*, provides for a number of miscellaneous amendments to unrelated provisions of the Internal Revenue Code of 1954 and other statutes.

[5] Under Section 4990, the tax is to be phased out over a 33-month period, beginning with the later of January 1988, or the first month (not later than January 1991) after the Secretary of the Treasury estimates that aggregate net revenues from the tax will exceed $227.3 billion as of the end of that month. Under Section 102 of the Act, 94 Stat. 255, revenues collected in the interim are required to be allocated to a separate account in the Treasury for the following uses: (1) income tax reductions (60 %), (2) low-income assistance (25 %), and (3) energy and transportation programs (15 %).

[6] In the case of "tier 1 oil"—*i.e.*, oil that does not qualify for the more favorable treatment accorded "tier 2" or "tier 3" oil—the base price reflects the applicable ceiling price (less 21 cents) for such oil if it had been sold as "upper tier" oil in May 1979, prior to the beginning of the phase out of the oil price controls provided for under the Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, 89 Stat. 871. Such "upper tier" prices under the then applicable regulations averaged $13.02 per barrel. H.R. Conf. Rep. No. 96-817, 96th Cong., 2d Sess. 92 (1980). The "base price" of "tier 2" and "tier 3 oil" is equal to the price at which such oil would have been sold in December 1979 on the assumptions (1) that the price of all domestic crude oil was then uncontrolled; and (2) that the average prices for domestic crude oil were then $15.20 per barrel for "tier 2 oil" and $16.55 for "tier 3 oil." Section 4989(c) and (d).

"windfall profit" exceed 90 % of the net income attributable to the oil (Section 4988(b)).

The rate of the tax varies between 30 % and 70 % of the "windfall profit" so determined. The rate depends upon the particular category of the oil (Section 4987(a)). The lowest rate (as well as the most favorable "base price" (see n.3, *supra*)) is applicable to "tier 3 oil" (which includes "newly discovered oil," "heavy oil" and "incremental tertiary oil" (Sections 4991(e) and 4993)).[7] The 30 % rate also applies to "independent producer oil" (Section 4992) that qualifies as "tier 2 oil" (which is oil from "stripper well properties" and from economic interests in National Petroleum Reserves held by the United States (Section 4991(d)). The highest rate (as well as the least favorable "base price") applies to "tier 1 oil" (which includes all nonexempt domestic oil other than "tier 2" or "tier 3" oil (Section 4991(c)) that does not qualify as "independent producer oil." "Tier 1 oil" that qualifies as "independent producer oil" and "tier 2 oil" that does not qualify as "independent producer oil" are taxable at the intermediate rates of 50 and 60 %, respectively.

Section 4991(b) exempts certain classes of oil from the tax. The exempt categories are: (1) oil from "qualified governmental interest[s]" (Section 4994(a)); (2) oil from "qualified charitable interest[s]" (Section 4994(b)); (3) certain oil from interests held by or for Indian tribes or their members or produced by corporations organized under the Alaska Native Claims Settlement Act, 43 U.S.C. (& Supp. IV) 1601 *et seq.* (Section 4994(d)); (4) "front-end tertiary oil" (Section 4994(c)); and (5) "exempt Alaskan oil" (Section 4994(e)). The last-mentioned category includes certain oil produced "(1) from a reservoir from which oil has been produced in commercial quantities through a well located north of the Arctic Circle, or (2) from a well located on the northerly side of the divide of the Alaska-Aleutian Range and at least 75 miles from the nearest point on the Trans-Alaska Pipeline System" (Section 4994(e)). However, exempt Alas-

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[7] Section 602 of the Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 337, amended Section 4987(b) to reduce the applicable tax rate in the case of "newly discovered oil" from 30 % to 15 %, in gradual steps during the period 1982-1986.

kan oil does not include "Sadlerochit oil," the only oil in the statutorily defined areas which was then in production. Sadlerochit oil is defined as "crude oil produced from the Sadlerochit reservoir in the Prudhoe Bay oilfield" (Section 4996(d)(3)).[8]

The liability for the windfall profit tax is ultimately placed on the "producer" of the oil (Section 4986(b)), defined generally as "the holder of the economic interest with respect to the crude oil" (Section 4996(a)(1)(A)). Section 4995, however, requires that the tax be withheld from the purchase price by the first purchaser of the oil, and further provides that the producer shall thereafter be treated as having paid the amount so withheld.[9]

### B. *The Proceedings Below*

Six of the appellees are independent domestic oil producers and/or royalty holders who alleged that they were subject to the windfall profit tax.[10] They brought this action in the United States District Court for the District of Wyo-

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[8] Further exemptions were provided for certain oil produced by independent producers from "stripper well propert[ies]" and specified portions of a "qualified royalty owner's qualified royalty production," under amendments made to Sections 4991(b) and 4994 by Section 601 of the Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 336-337.

[9] The tax is deductible, for income tax purposes, by the producer under Section 164(a)(5) of the 1954 Code, as added by Section 101(b) of the Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223, 94 Stat. 250. Certain holders of royalty interests, however, are entitled to treat up to $1,000 of windfall profit taxes paid with respect to their "qualified royalty production" for 1980 as a creditable or refundable "overpayment." Section 6429 of the Internal Revenue Code of 1954, as added by Section 1131 of the Omnibus Reconciliation Act of 1980, Pub. L. No. 96-499, 94 Stat. 2691. These provisions were extended to encompass "qualified royalty production" for the year 1981, and the amount allowable as a credit for that year was increased to $2,500, by Section 601 of the Economic Recovery Tax Act of 1981.

[10] The remaining appellees are 30 trade associations whose members are alleged to be oil producers or royalty holders subject to the tax, and the States of Texas and Louisiana, which were permitted to intervene in the case. See n.11, *infra*. Two other individual producers withdrew from the suit.

ming, seeking: (1) a declaratory judgment that the Alaskan oil exemption from the windfall profit tax violates the Uniformity Clause of Article I, Section 8, Clause 1, of the Constitution, and that the tax violates the Due Process and Taking Clauses of the Fifth Amendment to the Consitution; (2) an adjudication that all such taxes were illegally assessed and collected; and (3) an order directing the government to refund all such taxes (J.A. 6-21).[11]

On cross motions for summary judgment (J.A. 8-60), the district court first ruled that the question of the constitutionality of the windfall profit tax was ripe for decision even though there had been no production of "exempt Alaskan oil" during the periods in suit (see pp. 40-43, *infra*). It then held that the "exempt Alaskan oil" provision of the Windfall Profit Tax Act is unconstitutional under the Uniformity Clause. It reasoned that "[t]he Act, on its face, says that one state, Alaska, is not subject to the same tax, at the same rate as all the other states. This is a clear violation of the constitutional requirement of uniformity" (J.S. App. 7a). In so holding, the court rejected the government's argument that a rational justification for the Alaskan oil ex-

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[11] The original complaint did not allege that any of appellees filed administrative refund claims with respect to the taxes. However, appellees filed two amended complaints alleging that the producers and royalty holders had filed refund claims covering taxes paid for one or more taxable periods in calendar year 1980. The amended complaints also sought an order restraining the further assessment or collection of windfall profit taxes. Because the second amended complaint supplanted the earlier pleadings, the parties have not reproduced the previously filed complaints in the joint appendix.

In response to the government's motion to dismiss, urging, *inter alia*, that several trade associations lacked standing to join the action as plaintiffs, the district court dismissed the associations as plaintiffs but permitted them to remain as permissive intervenors. Moreover, over the government's objection, the district court permitted the States of Texas and Louisiana to intervene in the litigation urging that the windfall profit tax violates the Tenth Amendment as well as the Uniformity Clause (J.S. App. 61-2a; Louisiana Mot. to Aff. 3).

Finally, a subsequent suit that was filed by appellee John Partridge (J.A. 61-67), after filing a new refund claim covering all taxable periods in calendar year 1980, and which sought identical relief, was consolidated with the original action (J.S. App. 2a; J.A. 77).

emption supported its validity. As the court saw the matter, "[t]he Constitution has unequivocally set forth a limitation on indirect taxation—uniformity—which has been narrowly, but precisely defined by the judiciary. Distinctions based on geography are simply not allowed" (*ibid.*).[12]

The court also rejected the government's alternative contention that, at all events, pursuant to the "separability clause" in Section 7852(a) of the 1954 Code, the remaining provisions of the Act should be upheld, with respect to all domestic oil production not subject to other valid exemptions. The court stated that it would have given more "deferential consideration" to a separability clause written into the Windfall Profit Tax Act itself. It held that Section 7852(a) of the 1954 Code (to which the windfall profit tax provisions were added) was of "minimal" aid in providing a basis for sustaining the remaining tax provisions (J.S. App. 8a). In the district court's view, "the Alaska exemption was the result of negotiations and compromise, and * * * the Act as it exists today would not have been passed without the invalid Alaska provision" (J.S. App. 9a). Hence, it concluded that applying the "separability clause" of Section 7852(a) so as to extend the tax to Alaskan oil would require the court to engage in impermissible judicial legislation (J.S. App. 7a-10a).[13]

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[12] Although its ruling that the Windfall Profit Tax Act violated the Uniformity Clause obviated the necessity for consideration of appellees' claim that the Act was barred by the Due Process Clause of the Fifth Amendment, the court concluded that "[t]he Fifth Amendment challenge to the windfall profits tax is unfounded, and without merit * * *" (J.S. App. 10a).

[13] In its final amended judgment, the district court noted that its ruling was restricted to the provisions added by Title I of the Crude Oil Windfall Profit Tax Act of 1980 (26 U.S.C. (Supp. V) 4986-4998), and that it did not intend to hold the remaining provisions invalid as a result of its conclusion that the "exempt Alaskan oil" provisions could not be severed from the remaining provisions of the Act (J.S. App. 16a).

The district court stayed the effect of its order (J.S. App. 17a). Hence, no refunds have been issued to appellees and the windfall profit tax continues to be collected pendente lite. Accordingly, although the government argued below that appellees' suit for injunctive and declaratory relief is barred by the Anti-Injunction Act (26 U.S.C. (Supp.

## SUMMARY OF ARGUMENT

### I

In enacting the Crude Oil Windfall Tax of 1980, Congress exempted oil produced within certain geographically defined areas located on the "North Slope" of Alaska, and offshore oil that might be located on the Outer Continental Shelf adjacent to the North Slope. During the legislative debates, the point was repeatedly made, without contradiction, that because of its remote location, fragile environment, and extreme climatic conditions, the production of North Slope oil involved risks and costs far greater than the risks and costs of developing domestic oil properties elsewhere. The conference report similarly noted that the exemption "reflects the concern of the conferees that taxation of this production would discourage exploration and development of reservoirs in areas of extreme climatic conditions." H.R. Conf. Rep. No. 96-817, 96th Cong., 2d Sess. 103 (1980).

Prior to the decision below, no taxing statute had ever been held invalid on the ground that it violated the Uniformity Clause (Art. I, § 8, Cl. 1) of the Constitution, which requires that "Duties, Imposts and Excises shall be uniform throughout the United States." In ruling that the windfall profit tax violated that clause, the district court concluded that "[d]istinctions based on geography are simply not allowed" (J.S. App. 7a). Thus, it held that the "exempt Alaskan oil provisions" of the statute rendered the tax unconstitutional per se without regard to any rational justification that might exist for the exempt classification. The court's ruling rests upon a literal application of this Court's statement in the *Head Money Cases*, 112 U.S. 580, 594 (1884), that a "tax is uniform when it operates with the same force and effect in every place where the subject of it is found." In so ruling, the district court failed to take account of the underlying purpose of the Uniformity Clause (and the related Port Preference Clause), which was to prevent combinations of states from taking action that might,

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V) 7421(a)) and the tax exception to the Declaratory Judgment Act (28 U.S.C. (Supp. V) 2201), this Court need not decide those questions.

through the exercise of the taxing power, strike at the vital interests of one state or region. Quite the opposite happened here, where substantial congressional majorities (including members from oil producing states) recognized and chose to accommodate the special circumstances confined to a limited geographic area within one state. Indeed, this is not even a case in which one state has received a blanket exemption for all oil produced within its boundaries, for the exemptions at issue apply to only particular areas within Alaska and outside its boundaries on the Outer Continental Shelf. The role of judicial review in our constitutional system ordinarily would be thought to be quite limited where the claim is, at bottom, that the representative institutions of the federal government should be restrained from discriminating against 49 states in favor of one.

Moreover, the district court's conclusion that an excise tax is not uniform and therefore violates Article I, Section 8, Clause 1, where *any* geographical considerations are employed in the definition of the "subject" of or exemptions from the tax is at odds with the actual holding of the *Head Money Cases*. That case affirmatively supports the power of Congress to take geographical considerations into account in drawing legitimate tax classifications. At issue there was the constitutionality of a duty levied against transportation companies on foreign passengers entering the United States by vessel. The Court squarely rejected the contention that the duty violated the Uniformity Clause on the ground that it did not operate with strict geographical uniformity since, by its terms, it could apply only in states having sea ports (a matter necessarily determined by considerations of their geography) and not in landlocked states where foreign passengers might arrive by railroad or other inland mode of conveyance. The Court noted that "the evil to be remedied by this legislation" did not exist on the inland borders, and that "substantial uniformity within the meaning and purpose of the Constitution" was achieved by the uniform application of the statute in those quarters in which that "evil" was found to exist. 112 U.S. at 595. Thus, the Court confirmed Congress' broad power to pick and choose subjects that, as a matter of geographical con-

siderations alone, exist only in certain states, and to leave untaxed similar "subjects" existing in other states. Similarly, in construing the analogous uniformity proviso applicable to the exercise of the bankruptcy power, this Court, relying on the same analysis as in the *Head Money Cases*, concluded that the uniformity requirement "does not deny Congress power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems. " *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 159 (1974).

Here, too, the validity of the "Alaskan oil exemption" from the windfall profit tax should turn not, as the district court erroneously concluded, simply on the fact that Congress took geographical considerations into account, but rather on whether inclusion of those geographical considerations in the classification of the "subject" is justified in terms of the relationship of those considerations to the "subject" of the regulation or tax. Congress should be free to base an exemption on the distance of newly-discovered domestic oil from existing transportation systems and markets, and on unusual development costs resulting from extreme climatic and environmental conditions, even though those conditions might be found to exist only in limited areas and, perhaps, only within a single state. For example, if Congress had cast the exemption for North Slope oil in terms of the characteristics of remoteness of a location in which the average temperature did not exceed a particular level, there could be no quarrel with such a provision under the Uniformity Clause. An exemption provision that is designed to achieve precisely the same result, and that is justified by precisely the same considerations, should not be rendered unconstitutional on the ground that Congress chose to define the scope of the exemption not in terms of the underlying conditions themselves, but rather in terms of the only geographic location in which Congress had reason to believe that those conditions existed. Here, all oil producers who are similarly situated with respect to the purposes of the Windfall Profit Tax are treated alike regardless of their geographic location. This is the only uni-

formity the Constitution requires. The purpose of the Uniformity Clause is to provide substantive protection to the states, rather than to require mere niceties of congressional draftsmanship. And, more fundamentally, it would ill serve the great unifying purpose of the Constitution of which the Uniformity Clause is a part, for that clause to be interpreted as disabling the Congress and President from dealing with great national concerns, such as energy development and federal revenues, in a discerning, non-discriminatory way, as they did here.[14]

## II

At all events, even assuming the "exempt Alaskan oil" provisions of Sections 4991(b)(3) and 4994(e) are unconstitutional, the district court erred in holding that the windfall profit tax was thereby rendered invalid in its entirety. Section 7852(a) of the 1954 Code expressly provides that, if any provision contained in that title (26 U.S.C.) is held invalid, "the remainder of the title, and the application of such provision to other persons or circumstances, shall not be affected thereby." The decisions of this Court indicate that such "separability clauses" create, at a minimum, a strong presumption that Congress intended the courts to sever the unconstitutional portions of a statute and save the remainder. Moreover, the legislative history indicates that Con-

[14] Even on the assumption that the Uniformity Clause prohibits Congress from drawing a distinction between North Slope "newly discovered oil" and other domestic "newly discovered oil," there was still no violation of the Uniformity Clause during the periods properly in question here. It was uncontested that there was, in fact, no production of "exempt Alaska oil" during the periods covered by any of the refund claims in issue. Hence, during the only periods for which the legality of the tax can be questioned in this refund suit, the taxing provisons operated with precisely the "same force and effect in every place where the subject * * * [was] found." Put another way, all oil falling into each taxable category established by the Act (including "newly discovered oil") was subject to tax during these periods on the same basis wherever it was found. Since the assertedly defective provisions remained wholly inoperative during the period for which the taxes in question were collected, there was not simply "substantial uniformity," but strict geographical uniformity with respect to the imposition of those taxes during those periods.

gress fully understood not only that the various provisions added to the Code by the Act would be subject to the "separability clause" of Section 7852(a), but also that it would apply in such a way as to strike down only the Alaska oil exemption, in the event it were held to violate the Uniformity Clause. Therefore, even if it is assumed that the Alaska oil exemption is barred by the Uniformity Clause, the "separability clause" of Section 7852(a) saves the remaining provisions of the Act.[15]

## ARGUMENT

### I

### THE EXCLUSION OF CERTAIN GEOGRAPHICALLY DEFINED CATEGORIES OF ALASKAN OIL FROM THE CRUDE OIL WINDFALL PROFIT TAX DOES NOT VIOLATE THE UNIFORMITY CLAUSE OF THE CONSTITUTION

This case presents questions of great public importance to both the revenue and our national oil policy. In holding unconstitutional the windfall profit tax provisions added to the Internal Revenue Code of 1954 by the Crude Oil Windfall Profit Tax Act of 1980, the district court has invalidated an important federal tax statute that Congress enacted as an integral part of the decontrol of domestic oil pricing.[16]

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[15] At an absolute minimum, the separability clause of Section 7852(a) should be applied to sustain those portions of the taxing statute that apply to all categories of oil other than "newly discovered oil," which is the only type of oil that could ever qualify for the Alaskan exemption (see p. 50-51, n. 46, *infra*.).

[16] The amounts at stake are of enormous magnitude, and almost certainly exceed the revenues at issue in any other federal tax case ever presented to this Court. As we pointed out in our jurisdictional statement (at 8), it is estimated that the net windfall profit tax revenues from the inception of the tax through the end of the 1982 fiscal year are in excess of $26 billion, and that the net revenues during the next five years will be approximately $50 billion.

The gross revenues from the windfall profit tax through the end of fiscal year 1982 are estimated to be $50 billion. The windfall profit tax, however, is deductible for federal income tax purposes, under Section 164(a)(5) of the 1954 Code, and the windfall profit taxes attributable to economic interests owned by the United States reduce proprietary receipts. Accordingly, the net budgetary impact of the statutory provisions in question is smaller than the gross liability, but nevertheless very substantial.

The constitutional provision at issue here is the Uniformity Clause of Article I, Section 8, Clause 1, which requires that "Duties, Imposts and Excises shall be uniform throughout the United States." Prior to the decision below, no taxing statute had ever been held invalid on the ground that it violated the Uniformity Clause. In ruling that the windfall profit tax violated that clause, the district court flatly concluded that "[d]istinctions based on geography are simply not allowed" (J.S. App. 7a). Thus, it ruled that the exclusion of certain geographically defined categories of Alaskan oil from the windfall profit tax rendered the entire tax unconstitutional per se without regard to any rational justification that might exist for the exempt classification.

But, as we shall show, there is no per se rule in the Uniformity Clause jurisprudence of this Court that prohibits Congress from taking any geographical considerations into account in formulating excise tax statutes. Before addressing the Uniformity Clause decisions of this Court, however, it is important to consider the background of the Alaska oil exemption and the reasons why Congress distinguished between new oil produced within specific areas in Alaska and elsewhere.

### A. Congress determined that the difficulties of producing oil in the "North Slope" areas of Alaska justified special tax treatment

1. Congress enacted the windfall profit tax in response to President Carter's decision in April 1979, to begin phasing out the price controls that had been imposed on domestic oil since 1971. Oil price controls had been extended and made mandatory through May 31, 1979, by the Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, 89 Stat. 871. That Act gave the President discretionary authority to extend such controls from May 31, 1979, through September 30, 1981. At the time domestic crude oil prices were first frozen in 1971, the price of crude oil had risen from a prevailing price of about $2.90 per barrel during the prior decade, to $3.39 per barrel. By June 1979, the uncontrolled world price for oil (including transportation costs to the United States) had risen to nearly $20 per barrel, with "spot market" prices occasionally exceeding $30 per barrel. At the same time, the average controlled price of domestic

"old oil" was $5.86 per barrel, and the average controlled price of domestic "new oil" was $13.06 per barrel. President Carter's announcement indicated that existing controls would be phased out over a period beginning in January 1980, and ending on October 1, 1981, the effective date of the expiration of the President's authority under the Energy Policy and Conservation Act of 1975. See H.R. Rep. No. 96-304, 96th Cong., 1st Sess. 4-7 (1979).[17]

The President proposed the windfall profit tax as an integral part of his plan to phase out existing price controls "[i]n order to prevent oil producers from reaping excessive profits from decontrol * * *." H.R. Doc. No. 96-107, 96th Cong., 1st Sess. 1 (1979). The President noted that the gradual removal of price controls on domestic oil would encourage exploration and production, eliminate inequities and inefficiencies under the existing system of controls, reduce United States dependency on foreign oil, and reduce the adverse balance of payments attributable to the importation of oil. He further concluded, however, that "deregulation of domestic oil prices will also provide enormous windfall gains for domestic producers of oil" as domestic oil prices rise to the prevailing world price, which had been drastically affected and could continue to be affected by actions taken by the nations participating in the "OPEC cartel" (*id.* at 1-2).

In favorably reporting on the proposed legislation, the House Ways and Means Committee similarly noted that decontrol of domestic oil prices would lead not only to "limited increases in production," but also to increases in profits to oil producers "far in excess of what most of them originally anticipated when they drilled their wells and in excess of what they might now be expected to invest in energy production." H.R. Rep. No. 96-304, *supra*, at 7. Thus, it agreed that "the additional revenues received by oil producers and royalty owners, both as a result of decontrol of oil prices and as a result of increases in world oil prices substantially above those prevailing in 1978, are an appropri-

[17] The phase-out of price controls on domestic crude oil was actually completed by Exec. Order No. 12287, 3 C.F.R. 124, issued by President Reagan on January 28, 1981.

ate object of taxation" (*ibid.*). See also S. Rep. No. 96-394, 96th Cong., 1st Sess. 6, 27 (1979), setting forth the similar views of the Senate Finance Committee as to the imposition of such a tax on windfall profits from old oil.

As we have noted (pp. 2-5, *supra*), the tax that Congress ultimately enacted is imposed at varying rates, and the "windfall profit" subject to the tax is computed under varying bases, depending on the type of oil produced,[18] the nature of the producer,[19] the circumstances and manner under which the oil is produced,[20] and the time such oil was discovered and went into production.[21] While the pattern of classifications and exemptions was modified in certain respects as the proposed legislation was considered by the House and the Senate, the primary objective remained "to impose relatively high tax rates where production cannot be expected to respond very much to further increases in price and relatively low tax rates on oil whose production is likely to be responsive to price." H.R. Rep. No. 96-304, *supra*, at 7. See also S. Rep. No. 96-394, *supra*, at 7, 9.

Because of the unique climatological and environmental difficulties in oil extraction in the "North Slope" areas of Alaska, Congress recognized from the outset that oil produced in that region presented a special case with respect to both the existence of "windfall profits" and the determination of an appropriate tax to be imposed. Under the original Administration proposal, all oil produced from wells north of the Arctic Circle would have been exempt from the tax. H.R. 3919, 96th Cong., 1st Sess. § 2 (1979). At that time, because of the extraordinary transportation costs involved, Alaskan oil was selling for a wellhead price that

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[18] See, *e.g.*, Section 4991(e)(1)(B) and (e)(3) placing "heavy oil" in the favorable category of "tier 3 oil."

[19] See, *e.g.*, Section 4987(b)(2), providing for reduced tax rates in the case of "independent producer oil" as defined by Section 4992.

[20] See, *e.g.*, Section 4991(d)(1)(A) and (e)(1) providing that oil from "stripper well" properties and "incremental tertiary oil," as defined in Section 4993, are to be favorably treated as "tier 2 oil" and "tier 3 oil," respectively.

[21] See Section 4991(e)(1)(A), providing that "newly discovered oil" is to be favorably treated as "tier 3 oil."

was far below what eventually became the lowest "base price" for computing the taxable "windfall profit." Moreover, it was expected that the wellhead price for such oil would remain $8 to $9 less than the prevailing uncontrolled wellhead price of domestic oil produced elsewhere. H.R. Rep. No. 96-304, *supra*, at 30. See also Staff of Joint Comm. on Taxation, 96th Cong., 1st Sess., *The Design of a Windfall Profit Tax* 21 (Comm. Print 1979). Accordingly, the Secretary of the Treasury expressed the view that "there are no windfalls that will be gained by the producers of Alaskan crude." *Proposed Windfall Profits Tax and Creation of Energy Trust Fund: Hearings Before the House Comm. on Ways and Means*, 96th Cong., 1st Sess. 27 (1979) ("*House Hearings*")). As the Secretary explained, "[i]t is easier to exempt Alaskan production from the tax than to require Alaskan producers to file tax returns solely for the purpose of showing that no liability has been incurred." *House Hearings*, *supra*, at 19.[22]

By the time the proposal reached the House itself, further price increases indicated that the uncontrolled world price would soon reach a level at which the uncontrolled wellhead price for North Slope oil would exceed its 1979 ceiling. H.R. Rep. No. 96-304, *supra*, at 6-7. The House Committee on Ways and Means, and the House itself, nevertheless agreed with the concept of exempting "new oil" produced from wells north of the Arctic Circle, but proposed not to extend the exemption to "Sadlerochit oil," which had already gone into production. H.R. Rep. No. 96-304, *supra*, at 30. The bill as reported by the Senate Finance Committee, however, would have eliminated the ne-

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[22] As the Joint Committee staff study indicated (*House Hearings*, *supra*, at 21), the world price of oil would have to rise (as it ultimately did) to at least $22 per barrel (or the tariff rate for the Trans-Alaska Pipeline would have to be correspondingly reduced) in order for the price of Alaskan oil to rise to its then applicable ceiling price. The staff study also indicated (at 22) that the exemption was intended "to eliminate the possibility of creating a disincentive for the production of Alaskan oil." Although it concluded that there was relatively little risk that a tax on Sadlerochit oil would discourage production, it noted that production costs for the other two known Prudhoe Bay reservoirs would be higher.

cessity of providing such a specific exemption for new North Slope oil by proposing to exempt *all* "newly discovered oil" from the scope of the tax. S. Rep. No. 96-394, *supra*, at 42-43.[23] A floor amendment proposed by Senate Majority Leader Byrd, and approved by the Senate, however, provided for the imposition of a 10% tax on the "windfall profit" from "newly discovered oil (other than newly discovered oil produced north of the Arctic Circle)." 125 Cong. Rec. 3087, 36510 (1979).[24]

Thus, while the bills passed by the House and the Senate differed on a number of points, both ultimately provided for taxing "newly discovered oil," but on a favorable basis and subject to an exemption for new oil (*i.e.*, oil other than Sadlerochit oil) produced north of the Arctic Circle. The legislation thereafter took its final form in the version approved by the conferees assembled to reconcile the differences between the Senate and House bills. The conference version expanded the scope of the Alaskan exemption to include oil that might be produced in areas south of the Arctic Circle, but north of the divide of the Alaska-Aleutian mountain range, if produced from a well at least 75 miles from the nearest point on the Trans-Alaskan Pipeline System. The conference report noted that this exemption "re-

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[23] The Finance Committee proposal, like the provisions ultimately enacted (Section 4991(a)(2)), provided that the term "newly discovered oil" has the same meaning it had in the June 1979 energy regulations. Under that definition, the term would encompass all oil from properties from which no crude oil was produced in calendar year 1978. See 10 C.F.R. 212.79(b) (1981), 44 Fed. Reg. 25828, 25832 (1979). As the committee noted, this definition of "newly discovered oil" would exclude Sadlerochit oil. S. Rep. No. 96-394, *supra*, at 42-43.

[24] Amendments previously offered by Senators Ribicoff and Bradley would have taxed the "windfall profit" from "newly discovered oil" at a rate of 20%, but also would have exempted "newly discovered oil" produced north of the Arctic Circle. 125 Cong. Rec. 35258 (1979). Concerns with respect to the high costs and risks involved in producing North Slope oil and the disincentive to further exploration and development that would be imposed by subjecting that oil to tax had been expressed by both Senator Gravel (125 Cong. Rec. 31733 (1979)) and Senator Stevens (125 Cong. Rec. 33850, 34006-34009 (1979).

flects the concern of the conferees that taxation of this production would discourage exploration and development of reservoirs in areas of extreme climatic conditions." H.R. Conf. Rep. No. 96-817, 96th Cong., 2d Sess. 103 (1980). The conference version was approved without further change, by the House by a vote of 302 to 107 (126 Cong. Rec. H1861 (daily ed. Mar. 13, 1980)) and by the Senate by a vote of 66 to 31 (126 Cong. Rec. S3151 (daily ed. Mar. 27, 1980)).

2. As the very title of the Act (J.S. App. 20a) and the operative language of Section 4986(a) demonstrate, the subject of the windfall profit tax is the "windfall profit" derived from oil production. Thus, the statutory distinctions between different categories of oil do not turn upon differences in the physical character and quality of the product itself.[25] Instead, the statute focuses upon differences in the "windfall profit" that the holder of the economic interest in the property would realize from production after decontrol.

The structure of the tax reflects the fact that Congress was concerned with at least two distinct types of "windfall profit" that might be enjoyed by oil producers as a result of the decontrol of oil prices. The first and most readily identifiable element of such "windfall profit" was the additional revenues that would immediately be generated on the removal of price controls with respect to the continuing production of previously controlled oil. There was broad agreement among the Administration, the House and the Senate, as well as the tax committees of both houses, that the imposition of some form of tax was appropriate with respect to this element of "windfall profit," because (1) continued pro-

[25] One apparent exception is the classification of "heavy oil," which is defined in terms of its physical characteristics (Section 4991(e)(3)). This category is included within the favorably treated "tier 3" group. This classification, however, is not based on the fact that such oil has any favorable characteristics, but on the fact that it is more "tar-like" and, hence, more difficult to produce. S. Rep. No. 96-394, *supra*, at 51. Accordingly, the favorable treatment for "heavy oil," like that for "newly discovered oil" and "incremental tertiary oil," is based on considerations relating to the profit incentive necessary to employ the production techniques to produce such oil rather than the physical characteristics of the oil itself.

duction of such oil would lead to a supererogatory element of profit above that expected when the oil was developed to production; and (2) the imposition of such a tax was not expected to constitute a significant disincentive to continued production. See H.R. Rep. No. 96-304, *supra*, at 7; S. Rep. No. 96-394, *supra*, at 6; *House Hearings*, *supra*, at 174 (statement of Charles L. Schultze, Chairman of the Council of Economic Advisers).

There was considerably more controversy, however, as to whether any "windfall profit" would exist with respect to new production, or production of "old" oil by unconventional production techniques. As we have pointed out (p. 15, *supra*), one of the fundamental purposes of the removal of price controls was to encourage the discovery and development of new oil, as well as the exploitation of known reservoirs that could not profitably be developed through conventional production techniques. See H.R. Doc. 96-107, *supra*, at 2; *House Hearings*, *supra*, at 7-10, 16-17. While a second element of "windfall profit"—reflecting the increased revenues that might be generated from further increases in uncontrolled world oil prices—might nevertheless be attributed to both "old" oil and "new" oil, there was considerable debate whether that second element should be identified as a taxable "windfall profit" in the case of new oil. See S. Rep. No. 96-394, *supra*, at 7, and also at 167 (additional views of Senator Dole).

Moreover, Congress recognized that it was even more difficult to identify an element of "windfall profit" appropriate for taxation in the case of "North Slope" oil. Such oil was subject to extraordinary transportation costs, which served to reduce the wellhead price (and hence gross revenues) by $6-8 per barrel, and extraordinarily high exploration and development costs, which were estimated at several times the cost of domestic exploration and development elsewhere. See *Crude Oil Tax: Hearings on H.R. 3919 Before the Senate Comm. on Finance*, 96th Cong., 1st Sess. 218-224, 238-243 (1979); *House Hearings*, *supra*, at 453-455.[26] Congress ultimately agreed on a tax under which

[26] The basis for Congress' concern as to the effect of the imposition of even the smallest tax on new production on the North Slope is

conventionally produced "old oil" would generally be deemed to generate a "windfall profit" equal to the difference between the removal price and the May 1979 *controlled* price for "upper tier" oil, and such "windfall profit" would generally be taxable at the highest rate provided for by the statute. Production of "newly discovered oil" was also deemed to generate a "windfall profit," but only in the amount of the difference between the removal price and the December 1979 *uncontrolled* price for such oil, and that "windfall profit" was taxable only at the lowest rate provided for by the statute.

At the same time that Congress determined to treat Sadlerochit oil (the only oil then in production on the "North Slope" or elsewhere within the area defined by Section 4994(e)) on the same basis as other "old" oil, it entirely exempted new production in areas north of the Arctic Circle or north of the divide of the Alaska-Aleutian Range and more than 75 miles distant from the Trans-Alaska Pipeline System because of the differences in development and transportation costs for such oil. Thus, while the statute refers to "exempt Alaskan oil" (Section 4991(b)(3) and 4994(e)), that designation is simply a shorthand reference to the geographically defined areas subject to the exemption, and does not, as the district court mistakenly observed, apply to oil "found only in Alaska" (J.S. App. 4a). In fact, the exemption applies to any new production in areas north of the specified features (the Arctic Circle or the divide of the Alaska-Aleutian Range), including oil that might be produced in offshore United States territorial waters.[27]

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shown by the fact that a relatively small reduction in the price of oil during 1982 led to a slowdown of development in the Kuparuk River field. See 80 Oil and Gas J. 83 (July 12, 1982). The continued drop in oil prices is expected to delay exploitation of new finds in the area. See 286 The Economist 57, 59 (Jan. 29, 1983).

[27] Offshore oil found further than three miles from Alaska's coastline and located on the Outer Continental Shelf is subject to the exclusive jurisdiction and control of the United States. Jurisdiction over offshore areas closer than three miles has been conferred on the states by federal statute. Submerged Lands Act, 43 U.S.C. (Supp. IV) 1301-1315; see *Maryland* v. *Louisiana*, 451 U.S. 725, 730 (1981). The exercise of

Hence, the so-called Alaska exemption does not apply to all areas within the boundaries of the State of Alaska, or even to all oil produced in the areas to which it does apply. Indeed, as we shall discuss in further detail (pp. 40-43, *infra*), none of the oil produced in the State of Alaska during 1980 was eligible for the exemption, and, for 1981, only a minuscule portion of Alaskan production was exempt on this basis. Of 592 million barrels of crude oil produced in Alaska in 1981 (about 20 % of the total United States production), only about 800,000 barrels (or about 0.13 % of Alaskan production) qualified as "exempt Alaskan oil." Dep't of Energy, *U.S. Crude Oil, Natural Gas & Natural Liquids Reserves, 1981 Annual Report ("1981 Annual Report)* 22, Table 6 (1982); Internal Revenue Service, *Statistics of Income Bulletin* ("*S.I.B.*") 45, Table 6 (Fall 1982). Moreover, most of the Alaskan production was reported as taxable Sadlerochit oil (about 461 million barrels), all of which was taxable at the highest rate (70 %) provided for by the statute. *S.I.B.*, *supra*, at 43, Table 3. Finally, all other significant Alaskan production was in wholly non-exempt areas, primarily in the Cook Inlet.[28] Alaska Oil and

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the taxing power with respect to activities outside the states themselves is not subject to the Uniformity Clause. See p. 32-33 n.33, *infra*.

[28] As of the end of 1981, estimated proven reserves for the Kuparuk River field (the first "exempt Alaskan oil" to go into production) were 447 million barrels as compared with reserves for the Prudhoe Bay field of 7.2 billion barrels, most of which is in the Sadlerochit formation. Alaska Oil and Gas Conservation Commission, *1981 Statistical Report* 23; *The Design of the Windfall Profit Tax*, *supra*, at 21. All other proven Alaskan reserves (*ibid.*) are in other areas not encompassed by Section 4994(e). In their Mot. to Aff., the taxpayer and association appellees assert (p. 3 n.4) that there are estimated "undiscovered reserves" in the exempt area of 17.2 billion barrels. However, most "undiscovered recoverable resources" are attributed to offshore areas (see *Geological Survey Circular* 860, at 2 (Table 1), 74, 76, 78-79 (1981)). See also *Operator Interest in U.S. Beaufort Sea*, 80 Oil and Gas Journal 72, 77 (July 12, 1982); 65 AAPG Bulletin 1757, 1758 (Oct. 1981), indicating that much of the oil to be extracted from exempt regions will likely come from wells drilled on the outer continental shelf in areas leased from the United States. For example, while state leases in the exempt area totalled $59.7 million in 1982, federal leases

Gas Conservation Commission, *1981 Statistical Report*, *supra*, at 10-12. In sum, while production of "exempt Alaskan oil" from the Kuparuk field (which commenced in December 1981) was expected to reach the level of 250,000 barrels per day by the end of 1982, even at that rate, exempt production would remain far less than current production of taxable Sadlerochit oil.[29]

Indeed, the production of taxable Sadlerochit oil in 1981 far exceeded the total oil production of any other state except Texas. *1981 Annual Report*, *supra*, at 22, Table 6. Thus, while the taxpayer and association appellees assert (Mot. to Aff. 15 n.21), without citation and supporting authority, that the bulk of the windfall profit tax is "borne" by just five states (Texas, Louisiana, California, Oklahoma and Wyoming) and that the remainder is "borne" by 28 states none of which "bears" more than 3 % of the tax burden,[30] the undisputed fact is that a tax liability of $2.4 billion—nearly 10 % of the total reported liability for all domestic oil for 1981—was reported with respect to Sadlerochit oil alone. *S.I.B.*, *supra*, at 43, Table 3. Obvi-

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in the Outer Continental Shelf for that year totalled more than $2 billion. More significantly, the highest per/acre bid in the federal sales was $39,901, compared to the highest per acre bid in the state sales of $6,397. 80 Oil and Gas J. 58 (May 31, 1982); *id.* at 48-50 (Oct. 18, 1982).

[29] Although the taxpayer and association appellees suggest (Mot. to Aff. 2 n.1) that it is inaccurate to refer to the exemption as a "North Slope" or "Arctic oil" exemption because the exempt area defined by Section 4994(e) includes a large area below the Arctic Circle, those descriptive terms reflect the practical realities of the exemption. There has been no production from, and little exploration of, this additional area. Thus, in 1980 and 1981, only three exploration wells (all on native lands) were drilled in any area of Alaska outside of the Cook Inlet and North Slope areas. *Geological Survey Circular 884*, at 13. Estimated undiscovered crude oil resources in Alaskan areas south of the Arctic Circle and north of the divide of the Alaska-Aleutian Range are minimal, and possibly nonexistent. See *Geological Survey Circular 860*, *supra*, at 74-78. It is therefore far more accurate to refer to the exemption as a "North Slope" or "Arctic" exemption than to refer to it, as do the district court and the appellees, as an "Alaskan exemption."

[30] Obviously, none of these states "bear" this tax liability, nor is there any necessary correlation between the total tax burden that might be imposed on a particular state's production and the total tax burden that is borne by the residents of that state.

ously, then, a substantial portion of the overall tax liability imposed by the Act—and an amount at least comparable to that imposed in the five states singled out by the appellees in this regard—is imposed on Alaskan production, even though the removal price (and hence, the per barrel "windfall profit") of most of that oil is far less than that of other domestic "tier 1 oil" because of the extraordinary transportation costs involved. *S.I.B.*, *supra*, at 43, Table 2.

**B. The Uniformity Clause does not prohibit Congress from drawing tax classifications based on special circumstances existing within particular geographic areas**

***1. The Uniformity Clause Does Not Require Strict Geographic Uniformity But Was Intended to Prohibit Combinations of States From Imposing Discriminatory Taxes on Some States and Granting Undue Preferences to Others***

Article I, Section 8, Clause 1, of the Constitution provides that "The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises to pay the Debts and provide for the common Defence and general Welfare of the United States; *but all Duties, Imposts and Excises shall be uniform throughout the United States*" (emphasis added). As the Court noted in *Knowlton* v. *Moore*, 178 U.S. 41, 102-106 (1900), the Uniformity Clause is closely tied to the Port Preference Clause of Article I, Section 9, which provides that "No preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another * * *." See also C. Warren, *The Making of the Constitution*, 570-588 (2d ed. 1937).

The origin of the Uniformity Clause can be traced to a draft submitted to the Constitutional Convention on August 6, 1787, by its Committee on Detail. Closely following language earlier proposed by General Pinckney on this subject, the draft provided that the legislature be given the powers "to lay and collect taxes, duties, imposts and excises" and "[t]o regulate commerce with all nations, and among the several states." *Knowlton* v. *Moore*, *supra*, 178 U.S. at 101-103. With respect to the taxing power, however, the draft limited direct and "capitation" taxes to

those apportioned on the basis of the population and prohibited the laying of any tax or duty on articles exported from any state, or on the migration or importation of "such persons as the several states shall think proper to admit." The commerce power was similarly limited by a provision barring Congress from prohibiting "such migration or importation," and was also limited by a provision requiring a two thirds majority for approval of any "navigation act." A. Prescott, *Drafting of the Federal Constitution* 104-105 (1941).

These proposals addressed, but did not resolve, a number of sectional fears and jealousies reflecting not only the division concerning the institution of slavery, but also the economic divisions among the agricultural, manufacturing, and shipping interests of the various states. See *Warren, supra*, at 570-574. Many of these differences were settled by the compromise approved by the Convention on August 29, 1787, which eliminated the restriction regarding "navigation acts," and which limited the power to tax, but allowed for the prohibition after 1808 of "the migration or importion of * * * persons." *Warren, supra*, at 578-582.

Nevertheless, this "crucial compromise" (*Warren, supra*, at 578) did not allay all of the fears of the delegates relating to the broad powers to regulate commerce and to impose taxes. On August 25, 1787, Messrs. Carroll and Martin of Maryland had moved the following proposition (C. Tansill, *Documents Illustrative of the Formation of the United States* 619 (1927)):

> The Legislature of the U.S. shall not oblige vessels belonging to citizens thereof, or to foreigners, to enter or pay duties or imposts in any other state than in that to which they may be bound, or to clear out in any other than the State in which their cargoes may be laden on board; nor shall any privilege or immunity be granted to any vessels on entering or clearing out, or paying duties or imposts in one State in preference to another.

This proposal was designed to prevent the national legislature from favoring the ports of certain states by requiring all vessels to enter and clear at those ports. *Knowlton* v.

*Moore, supra*, 178 U.S. at 103; *Warren, supra* at 586. Because some delegates believed that this proposal would facilitate smuggling, Mr. McHenry of Maryland and General Pinckney of South Carolina proposed the following provision (*Tansill, supra*, at 619):

> "Should it be judged expedient by the Legislature of the U.S. that one or more ports for collecting duties or imposts other than those ports of entrance & clearance already established by the respective States, should be established, the Legislature of the U.S. shall signify the same to the Executives of the respective States, ascertaining the number of such ports judged necessary; to be laid by the said Executives before the Legislatures of the States at their next Session; and the Legislature of the U.S. shall not have the power of fixing or establishing the particular ports for collecting duties or imposts in any State, except the Legislature of such State shall neglect to fix and establish the same during their first session to be held after such notification by the Legislature of the U.S. to the Executive of such State."
>
> "All duties imposts & excises, prohibitions or restraints laid or made by the Legislature of the U.S. shall be uniform & equal throughout the U.S."

A Special Committee, to whom these proposals were referred, thereafter recommended the following clause incorporating these suggestions (*id.* at 626):

> "Nor shall any regulation of commerce or revenue give preference to the ports of one State over those of another, or oblige vessels bound to or from any State to enter, clear or pay duties in another and all tonnage, duties, imposts & excises laid by the Legislature shall be uniform throughout the U.S."

Although the Convention ultimately adopted this proposal, it was not set forth in a single clause. Rather, the first half containing the Port Preference Clause was placed in Section 9 of Article I; the second half containing the Uniformity Clause was added to Section 8 of Article I. "Thus, it came to pass that although the provisions as to preference

between ports and that regarding uniformity of duties, imposts and excises were one in purpose, and in their adoption, they became separated only in arranging the Constitution for purpose of style." *Knowlton* v. *Moore*, *supra*, 178 U.S. at 105.

The successive versions of the Uniformity Clause demonstrate not only the close relationship between it and the Port Preference Clause, but also that the Framers did not intend to require "intrinsic" uniformity, *i.e.*, that duties, imposts or excises fall equally on the various states or their populations. As the Court observed in *Knowlton* v. *Moore*, *supra*, 178 U.S. at 104—

> The sense in which the word 'uniform' was used is shown by the fact that the committee, whilst adopting in a large measure the proposition of Mr. McHenry and General Pinckney, 'that all duties, imposts, excises, prohibitions or restraints * * * shall be uniform and equal throughout the United States,' struck out the words 'and equal.' Undoubtedly, this was done to prevent the implication that taxes should have an equal effect in each State. As we have seen, the pith of the controversy during the confederation was that even, although the same duty or the same impost or the same excise was laid all over the United States, it might operate unequally by reason of the unequal distribution or existence of the article taxed among the respective States.

The agricultural states considered the adoption of the Uniformity and Port Preference Clauses to be a victory over the large states with ports and substantial shipping interests, and a prophylactic measure against further oppressive combinations among these states. See Report of North Carolina delegates to Governor Caswell, in *Warren*, *supra*, at 726-727. As Joseph Story explained in his classic constitutional test:

> The answer to the * * * [uniformity requirement] may be given in a few words. It was to cut off all undue preferences of one state over another, in the regulation of subjects affecting their common interests. Unless duties, imposts and excises were uniform, the

> grossest and most oppressive inequalities vitally affecting the pursuits and employments of the people of different states might exist.

J. Story, *Commentaries on the Constitution of the United States*, § 957, at 673 (2d ed. 1851). In short, the Uniformity Clause was designed to prevent "combinations" that might, through the exercise of the taxing power, strike at the "vital interests" of one region. *Ibid.* See also *Warren, supra* at 587-588, 726-727.

**2. *Congress' reason for exempting new oil produced within the "North Slope" of Alaska does not contravene the purpose of the Uniformity Clause***

In light of the legislative background of the windfall profits tax (see pp. 13-23, *supra*), it is plain that Congress had a rational basis for excluding certain geographically defined categories of Alaskan oil from the coverage of the windfall profit tax. Moreover, the basis of Congress' decision does not violate the underlying purpose of the Uniformity Clause, which was to prevent combinations of states from imposing taxes that grant an undue preference to their own states or to impose an oppressive discrimination against a minority. Hence, the validity of the "Alaskan oil exemption" should not turn, as the district court erroneously concluded, simply on the fact that Congress took geographical considerations into account. Rather, the question is whether the classification based on those geographic considerations is justified by the relationship of those considerations to the "subject" of the regulation or tax. Put another way, the question is whether, in fashioning the tax, Congress could, while favoring generally "newly discovered oil" over "old oil," accord the most favorable treatment to "newly discovered oil" located in certain areas (Section 4994(e)).[31]

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[31] The scope of Section 4994(e) is not, as the Taxpayer and Association appellees suggest (Mot. to Aff. 10), defined in terms of the geographic boundaries of the State of Alaska, but in terms of the relative position of the well vis-a-vis the Arctic Circle or the divide of the Alaska-Aleutian Range and the Trans-Alaskan Pipeline.

There can, of course, be no dispute that the exemption here at issue is geographically defined so as to exclude oil located in all of the 50 states except portions of Alaska. It is equally beyond dispute, however, that Congress had a rational basis for drawing such a classification. Obviously, this is not an instance in which "combinations" of states have drawn taxing legislation in such a way as to grant an "undue preference" in favor of their own states or to impose an "oppressive" discrimination against a minority. Rather, it is an instance of a broad-based congressional majority (including many members from other oil-producing states) granting an exemption applicable to only a portion of the oil production that might be derived in the future from certain areas that include a part of a single state.

Nor could these provisions be characterized as an "undue preference" in favor of Alaskan producers. Indeed, the benefit of the exemption falls on the owners of economic interests in that oil wherever they might reside or be incorporated. Moreover, the "subject" of the tax in question is not the production of crude oil, per se, but the enjoyment of a "windfall profit" by the holders of such economic interests as a result of the removal of price controls on domestic oil and the concomitant increase in the selling price of such oil to the prevailing world price. The various classifications adopted with regard to this tax demonstrate Congress' belief that the existence and extent of such "windfall profits," as well as the appropriate tax to be levied, would vary on the basis of a number of factors including the nature and type of the oil in question, the nature of the producer and the quality of his interest in the oil, and the circumstances under which the oil is produced. As the legislative history of the Act makes clear, Congress sought to draw tax classifications that would not deter producers from fully exploiting existing properties or from exploring and developing new properties. See H.R. Rep. No. 96-304, *supra*, at 7, 14; S. Rep. No. 96-394, *supra*, at 2, 6, 7.

The critical question therefore is whether Congress could carve out a portion of the "newly discovered oil" that might be produced in areas north of the Arctic Circle or in areas located north of the Alaska-Aleutian Range and more than

75 miles from the Trans-Alaska Pipeline System and accord such oil even more favorable treatment. We submit that this exemption serves the legitimate purposes of the legislation in question, and that it does not violate the Uniformity Clause, despite the fact that it is defined in terms of the geographic location of such oil. Congress had substantial grounds for concluding that North Slope oil—particularly North Slope oil that had not yet gone into production—presented a special case, distinct from domestic oil found elsewhere (including other oil found in Alaska). First, North Slope oil that was in production at the time the tax was under consideration brought a substantially lower price at the wellhead than did equivalent oil produced in other locations of the United States because of its distance from existing markets and the necessity of transporting it over the newly constructed Trans-Alaska Pipeline. Indeed, the price of such North Slope oil was only about half the applicable ceiling price for such oil. H.R. Rep. No. 96-304, *supra*, at 5, 30. Moreover, Congress anticipated that the wellhead price for such oil would continue, in the foreseeable future, to be $8 to $9 less than the prevailing wellhead prices in other producing states.[32]

Second, during the debates, the point was repeatedly made, without contradiction, that because of its "severe weather conditions, remoteness, sensitive environmental and geological characteristics, and a lack of normal social and industrial infrastructure," the production of North Slope oil involved risks and costs far greater than the risks and costs of developing domestic oil properties elsewhere. See, *e.g.*, 125 Cong. Rec. 31733, 33850, 34006-34009 (1979); and S17478-S17480 (daily ed. Nov. 29, 1979) (comments of Senators Bradley and Stevens). Accordingly, Congress had substantial reason to question whether North Slope oil (other than that produced from the Sadlerochit reservoir) would, in fact, generate a "windfall profit" comparable to that generated by the other categories of oil subject to this

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[32] In fact, the tax returns for 1981 indicate that there was a difference of more than $10 per barrel between the removal price of Sadlerochit oil and "tier 1" oil generally. See *S.I.B.*, *supra*, at 44, Table 4.

tax, and to conclude that the imposition of even the relatively small windfall profit tax burden applicable in the case of other "newly discovered oil" might deter further exploration and development of North Slope properties. There was no showing either in Congress or in the court below that domestic production elsewhere would involve the combination of similar developmental costs and risks and transportation-related disparities.

In sum, it was entirely consistent with the purpose of the Uniformity Clause for Congress to draw an exemption provision based, in general terms, on the distance of newly-discovered domestic oil from existing transportation systems and markets, and on unusual development costs incurred as a result of extreme climatic and environmental conditions, even though those conditions were found to exist only in a limited geographic area, including a portion of only a single state. Indeed, if Congress had cast the exemption for North Slope oil in terms of a location of a certain degree of remoteness, climate, and environmental obstacles, there could be no quarrel with such a provision under the Uniformity Clause. An exemption provision that is designed to achieve precisely the same result, and that is justified by precisely the same considerations, should not be rendered unconstitutional on the ground that Congress chose to define the scope of the exemption not in terms of the underlying conditions themselves, but rather in terms of the only geographic location in which Congress had reason to believe that those conditions existed. The purpose of the Uniformity Clause is to provide substantive protection to the states, rather than to require mere niceties of congressional draftsmanship. And, more fundamentally, it would ill serve the great unifying purpose of the Constitution of which the Uniformity Clause is a part, for that clause to be interpreted as disabling the Congress and President from dealing with great national concerns, such as energy development and federal revenues, in a discerning, nondiscriminatory way, as they did here.

### 3. *The decisions of this Court under the Uniformity Clause support the validity of the exemption of North Slope Alaska Oil*

a. The decisions of this Court confirm that the Uniformity Clause does not require what might be termed "intrinsic" uniformity. Thus, Congress' broad power to choose the appropriate subjects of taxation encompasses the power to choose subjects that do not exist uniformly throughout the United States. *Knowlton* v. *Moore, supra*, 178 U.S. at 108. Assuming the subject chosen by Congress for taxation (or exemption) itself represents a permissible classification, the Uniformity Clause is not violated simply because that subject occurs only in a few states, or indeed only in a single state.

To be sure, where no other distinction can properly be drawn between a "subject" as it exists in different states, the Uniformity Clause may require the same treatment in each instance. But while classifications that operate only in certain areas might be subject to special scrutiny in light of the purposes of the Uniformity Clause, we submit that the inquiry cannot be separated from the question whether the tax classifications drawn by Congress are supported by rational considerations showing that they are not intended, and do not operate, either as an "undue preference" in favor of, or an "oppressive" discrimination against,the affected states.

Thus, the holding of this Court in the *Head Money Cases*, 112 U.S. 580 (1884), affirmatively supports the power of Congress to take geographical considerations into account in drawing legitimate tax classifications. At issue there was the constitutionality of a duty levied against transportation companies on foreign passengers entering the United States by vessel. The Court squarely rejected the contention that the duty violated the Uniformity Clause on the ground that it did not operate with strict geographical uniformity since, by its terms, it could apply only in states having sea ports (a matter necessarily determined by their geography) and not in landlocked states where foreign passengers might arrive by railroad or other inland mode of conveyance. In so ruling, the Court observed that "[p]er-

fect uniformity and perfect equality of taxation, in all the aspects in which the human mind can view it, is a baseless dream * * *" (112 U.S. at 595). The Court noted that "the evil to be remedied by this legislation has no existence on our inland borders, and immigration in that quarter needed no such regulation" (*ibid.*), and that "substantial uniformity within the meaning and purpose of the Constitution" was achieved by the uniform application of the statute in those quarters (*i.e.*, seaports) in which that "evil" was found to exist (*ibid.*). Thus, the Court confirmed that Congress' broad power to pick and choose subjects of taxation includes the power to choose subjects that, as a matter of geographical considerations alone, exist only in certain states, and to leave untaxed similar "subjects" existing in other states. The ultimate question, in the Court's view, was whether Congress had a reasonable basis for distinguishing between the activity that was taxed in coastal states and the similar activity that was untaxed in inland states.

Similarly, in *Knowlton* v. *Moore*, *supra*, the Court considered a challenge to the federal inheritance tax on the ground, *inter alia*, that it was not uniform because the rate of taxation turned on the degree of the relationship between a deceased and the beneficiaries, which in turn depended on testamentary and intestacy laws that differed from state to state. In rejecting that argument, the Court stated (178 U.S. at 108)—

> The proposition in substance assumes that the objects taxed by duties, imposts and excises must be found in uniform quantities and conditions in the respective States, otherwise the tax levied on them will not be uniform throughout the United States. But what the Constitution commands is the imposition of a tax by the rule of geographical uniformity, not that in order to levy such a tax objects must be selected which exist uniformly in the several States.

See also, *e.g.*, *Flint* v. *Stone Tracy Co.*, 220 U.S. 107, 158 (1911); *Billings* v. *United States*, 232 U.S. 261, 282-284 (1914); *Fernandez* v. *Wiener*, 326 U.S. 340, 359-361 (1945).[33]

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[33] It is well established, however, that the Uniformity Clause does not apply at all to territories, federal enclaves, or other possessions of

b. Appellees agree that the Uniformity Clause does not mandate intrinsic uniformity (see Taxpayers and Association Mot. to Aff. 10). Hence, Congress could presumably impose an excise tax on the harvesting of citrus fruits even though such a commodity might be (or even could be) grown in only a few of the several states. Appellees contend, however, that the Uniformity Clause strictly prohibits Congress from casting an excise tax (or an exemption) in geographic terms, even if it has a rational basis for distinguishing between the various geographic circumstances where the subject of the tax might be found. In so urging, appellees invoke this Court's statement in the *Head Money Cases*, *supra*, 112 U.S. at 594, quoted in *Knowlton* v. *Moore*, *supra*, 178 U.S. at 86, upon which the district court likewise relied (J.S. App. 6a), that "The tax is uniform when it operates with the same force and effect in every place where the subject of it is found."

But this statement cannot be read as an abstract rule of constitutional law without regard to the context in which it was rendered. Indeed, the decisions of this Court have never construed the Uniformity Clause to require the strict geographic uniformity which the district court prescribed. As we have pointed out (*supra*, pp. 31-32), the subject of the tax at issue in the *Head Money Cases* was "the business of bringing passengers from foreign countries into this, by ocean navigation * * *" (112 U.S. at 594). Because the "subject" of the tax was foreign passengers arriving by ocean navigation, not foreign passengers generally, the Court concluded that the tax "[was] uniform [because it] operat[ed] precisely alike in every port of the United States where such passengers [could] be landed" (*ibid.*). By means

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the United States, but is limited to the States. *Downes* v. *Bidwell*, 182 U.S. 244, 278, 287 (1901); *Mercury Press* v. *District of Columbia*, 173 F.2d 636, 637 (D.C. Cir., 1948); Bosley, *The Constitutional Requirement of Uniformity in Duties, Imposts and Excises*, 9 Yale L.J. 164 (1900). Hence, the Clause places no restriction on Congress with respect to taxation or exemption of offshore oil located in the outer continental shelf and, arguably, has no application in the case of any offshore oil. See pp. 20-21 n. 27, *supra*.

of this analysis, the Court upheld Congress' power to define the subject of a tax, even in geographic terms, in order to remedy a specific national problem. The Court made that clear when it stated that "the evil to be remedied by this legislation has no existence on our inland borders, and immigration in that quarter needed no such regulation" (*id.* at 595). In these circumstances, the tax operated with "the same force and effect where the subject of it is found" because "the law applie[d] to all *ports* alike, and evidently g[ave] no preference to one over another * * *" (*ibid.*; emphasis in original). Accordingly, the Court concluded that "Here there is substantial uniformity within the meaning and purpose of the Constitution" (*ibid.*).

The foregoing analysis fully applies to this case and demonstrates that there is no constitutional prohibition against properly casting an excise tax in geographic terms. Here, Congress has identified "windfall profit" from the sale of oil by the producer as the subject of the tax, and has further determined that oil produced within a particular geographic area is not part of "the evil to be remedied," *i.e.*, that such exempt oil will not generate *windfall* profits for its producers because of the particular economic differences arising from the characteristics of the area. Just as in the *Head Money Cases* Congress could identify foreign passengers arriving in ports (as opposed to inland cities) as the subject of the tax, here, too, Congress could identify the production and sale of various categories of oil (as opposed to North Slope newly discovered oil) as the subject of a windfall profits tax. Contrary to appellees' argument (Taxpayers and Association Mot. to Aff. 10), the fact that the tax in the *Head Money Cases* was cast in terms of "ports," rather than in particular geographic terms, does not distinguish that precedent for purposes of this case. Both the word "ports" and the statutorily defined categories of exempt Alaskan oil are terms necessarily requiring geographic inclusion and exclusion from the operation of the tax. Hence, in both instances, Congress can, consistently with the Uniformity Clause, properly define the subject of a tax even though that subject is not to be found within a particular geographic area. "The question always is, when a classifica-

tion is made, whether there is any reasonable ground for it, or whether it is only and simply arbitrary, based upon no real distinction and entirely unnatural * * *. If the classification be proper and legal, then there is the requisite uniformity in that respect." *Nicol* v. *Ames*, 173 U.S. 509, 521 (1899). Here, all oil producers who are similarly situated with respect to the purposes of the Windfall Profit Tax Act are treated alike regardless of their geographic location. This is the only uniformity the Constitution requires.

#### 4. *Analogous decisions of this Court construing the Bankruptcy Clause and Port Preference Clause support Congress' power to take geographic considerations into account in enacting excise taxes*

Our submission that the Uniformity Clause does not bar Congress from taking pertinent geographic considerations into account in enacting excises taxes finds further support in the decisions of this Court construing the Bankruptcy Clause and Port Preference Clause of the Constitution.

a. *The Bankruptcy Clause.* Article I, Section 8, Clause 4 of the Constitution gives Congress power "To establish * * * uniform Laws on the subject of Bankruptcies throughout the United States." The language of the Bankruptcy Clause is comparable to the Uniformity Clause insofar as both provisions mandate laws that are "uniform" in their application throughout the Nation. In the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), the Court considered a challenge to the Regional Rail Reorganization Act of 1973, on the ground that it violated the bankruptcy uniformity requirement because it operated only in a single statutorily defined region. Although the Court acknowledged that "the argument has a certain surface appeal," it concluded that it "is without merit because it overlooks the flexibility inherent in the constitutional provision" (*id.* at 158). As the Court observed, "[t]he uniformity provision does not deny Congress power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems" (*id.* at 159).[34]

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[34] *Railway Labor Executives' Ass'n* v. *Gibbons*, 455 U.S. 457 (1982), upon which the Taxpayer and Association appellees rely (Mot.

Significantly, for purposes of this case, the Court relied upon its analysis of the Uniformity Clause in the *Head Money Cases, supra*. In terms that convincingly refute the district court's conclusion (J.S. App. 7a) that "[d]istinctions based on geography are simply not allowed," the Court stated (419 U.S. at 160-161):

> Our construction of the Bankruptcy Clause's uniformity provision comports with this Court's construction of other "uniform" provisions of the Constitution. The *Head Money Cases*, 112 U.S. 580 (1884), involved the levy on ships' agents or owners of a 50-cent tax for any passenger not a United States citizen who entered an American port from a foreign port "by steam or sail vessel." Individuals engaged in transporting passengers from Holland to the United States challenged the levy as contrary to Art. I, § 8, cl., 1, under which Congress is empowered to lay and collect "all Duties, Imposts and Excises [which] shall be uniform throughout the United States." The argument was that the head tax violated the uniformity clause because it was not also levied on noncitizen passengers entering this country by rail or other inland mode of conveyance. The Court upheld the tax, stating:
>
>> "The tax is uniform when it operates with the same force and effect in every place where the subject of it is found. The tax in this case * * * is uniform and operates precisely alike in every port of the United States where such passengers can be landed." 112 U.S. at 594.

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to Aff. 6, 9, 12, 17), is not to the contrary. There, the Court invalidated an Act of Congress that was "not a response either to the particular problems of major railroad bankruptcies or to any geographically isolated problem: it [was] a response to the problems caused by the bankruptcy of *one* railroad" (455 U.S. at 470; emphasis in original). While the Court reaffirmed its prior decision in the *Regional Rail Reorganization Act Cases, supra*, as upholding "bankruptcy laws that apply to a particular industry in a particular region," it concluded that "[t]he uniformity requirement, however, prohibits Congress from enacting a bankruptcy law that, by definition, applies only to one regional debtor" (455 U.S. at 473), *i.e.*, a private bankruptcy law.

That the tax was not imposed on noncitizens entering the Nation across inland borders did not render the tax nonuniform since "the evil to be remedied by this legislation has no existence on our inland borders, and immigration in that quarter needed no such regulation." 112 U.S. at 595. Similarly, the Rail Act is designed to solve "the evil to be remedied," and thus satisfies the uniformity requirement of the Bankruptcy Clause. The argument that the Rail Act differs from the head tax statute because by its own terms the Rail Act applies only to one designated region is without merit. The definition of the region does not obscure the reality that the legislation applies to all railroads under reorganization pursuant to § 77 during the time the Act applies.

b. *The Port Preference Clause.* As we have pointed out (*supra*, p. 23), Article I, Section 9, Clause 6 of the Constitution provides that "No preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another * * *." This provision and the Uniformity Clause "were, in effect, in framing the Constitution, treated, as respected their operation, as one and the same thing, and embodied the same conception." *Knowlton* v. *Moore*, *supra*, 178 U.S. at 106.

To the extent that the Court has addressed the Port Preference Clause, it has likewise accorded Congress considerable latitude in drawing distinctions between particular ports of different states. For example, in *Commission* v. *Texas N.O.R.R.*, 284 U.S. 125 (1931), the Louisiana Public Service Commission challenged certain intrastate railroad tariffs set by the Interstate Commerce Commission on the ground that the rates, in effect, favored the ports of Texas over those of Louisiana (*id.* at 130). The ICC rate schedule was intended to rectify the discrimination caused by Louisiana's intrastate rates against shippers in Texas who were equidistant or closer to destinations in Louisiana than shippers in Louisiana (*id.* at 135). The Court rejected Louisiana's challenge in the following terms (*id.* at 131) (emphasis added):

> The specified limitations on the power of Congress were set to prevent preference as between States in

> respect of their ports or the entry and clearance of vessels. *It does not forbid such discriminations as between ports.* Congress, acting under the commerce clause, causes many things to be done that greatly benefit particular ports and which incidentally result to the disadvantage of other ports in the same or neighboring States. The establishing of ports of entry, erection and operation of lighthouses, improvement of rivers and harbors and the providing of structures for the convenient and economical handling of traffic are examples [citations omitted]. The construction for which appellants contend would strip Congress of much of the power that it long has been accustomed to exert and which always has been held to have been granted to it by the commerce clause.

*Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855), is to the same effect. There, Congress had authorized the building of a bridge across the Ohio River that was too low to allow clearance of all vessels plying the river. The State of Pennsylvania attacked this impediment to waterborne commerce on the ground that it favored the port of Wheeling, Virginia, at the expense of the port of Pittsburgh, Pennsylvania, and therefore violated the Port Preference Clause. But the Court refused to ascribe such a broad prohibition to the Clause. In the Court's view (*id.* at 435):

> [W]hat is forbidden is, not discrimination between individual ports within the same or different States, but discrimination between States: and if so, in order to bring this case within the prohibition, it is necessary to show not merely discrimination between Pittsburgh and Wheeling, but discrimination between the ports of Virginia and those of Pennsylvania.

Thus, the Court held that the discrimination that was the object of the Port Preference Clause was not simply any distinction between various ports, but rather systematic discrimination in favor of, or against, the commerce of one state. It was not intended to proscribe laws merely because they incidentally favored or prejudiced some line of commerce in one state or another. *Pennsylvania* v. *Wheeling*

*& Belmont Bridge Co.*, *supra*, 59 U.S. (18 How.) at 433-434; *South Carolina* v. *Georgia*, 93 U.S. 4, 13 (1876).

Given the close relationship between the Port Preference Clause and the Uniformity Clause, the Court's decisions support our submission that the Uniformity Clause likewise prohibits only systematic preference for or discrimination against a particular state or states. Here, with respect to the windfall profit tax, there is no systematic preference in favor of production of oil in Alaska. While some "newly discovered oil" that has been produced in Alaska since December 1981 is treated more favorably than "newly discovered oil" produced elsewhere, it is equally true that the bulk of Alaskan oil production has been, and is likely to continue to be, taxable at the highest rate applicable under the statute, and therefore taxed less favorably than a great deal of oil produced elsewhere in the United States. As Senator Stevens noted, the favorable treatment accorded to oil produced from "stripper well" properties and to "independent producer oil" are of little benefit to Alaskan producers because there are no "stripper wells" and few, if any, "independent producers" operating in that state. 125 Cong. Rec. 34006-34007 (1979). Indeed, Senator Long indicated that one of the reasons for adopting the "exempt Alaskan oil" provisions was to reduce what otherwise might have been considered to be a disproportionate share of the overall tax burden being imposed on Alaskan producers. 126 Cong. Rec. S3056 (daily ed. Mar. 26, 1980). While it is well settled that the Uniformity Clause does not require "intrinsic" uniformity or equivalence in the tax burden imposed on the populations of the various states, the Framers of the Constitution could hardly have intended that the Uniformity Clause would impede Congress from distributing the burden of a tax more equitably among the states. Indeed, the role of judicial review in our constitutional system ordinarily would be thought to be quite limited where the claim is, at bottom, that the representative institutions of the federal government should be restrained from discriminating against 49 states in favor of one.

**C. The Windfall Profit Tax Act Operated With Absolute Geographic Uniformity As To All Domestic Oil Produced Prior To December 1981**

Even on the assumption that the district court correctly ruled that the Uniformity Clause requires that all crude oil be taxed on the same basis without regard to the geographic area in which it is found, it erred in holding that the windfall profit tax violated that requirement during the periods in question in this suit. It is undisputed that there was no production of any oil that was actually exempt from tax under the "exempt Alaskan oil" provision until December 1981, almost one full year after the end of the last period covered by any of the refund claims in this case (J.A. 22, 26, 29, 31, 68, 71). Viewing this obstacle to decision simply as a matter of "ripeness" (J.S. App. 4a), the district court concluded that the issue was ripe for decision because exempt production from the Kuparuk River field had commenced by the time of its decision. It simply assumed that its ruling would govern the refund claims for the prior periods. But the court's ruling was erroneous in light of the narrow scope of its jurisdiction in this tax refund suit. Thus, even if the constitutional issue became ripe for decision with respect to later periods, the district court should not have invalidated the tax for those periods in which it operated with absolute geographic uniformity.

1. One of the most firmly established principles of our jurisprudence is the exercise of judicial restraint in reaching and deciding constitutional issues. This Court has often emphasized the need for caution in entertaining constitutional challenges to legislation and declaring such legislation unconstitutional. See *Ashwander* v. *TVA*, 297 U.S. 288, 345-346, 354-355 (Brandeis, J., concurring) (1936); *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 568-573 (1947). The question of the constitutionality of revenue acts, in particular, has been treated with special caution. *Nicol* v. *Ames*, *supra*, 173 U.S. at 515.

Among the interrelated body of principles upon which the Court has relied in refusing to reach constitutional issues prematurely or unnecessarily is the doctrine of "ripeness"—*i.e.*, that the issue ordinarily will not be reached

unless the alleged constitutional injury actually has occurred, or in injunctive suits, unless such constitutional injury is imminent.[35] See, *e.g.*, *Boyle* v. *Landry*, 401 U.S. 77, 80-81 (1971); *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 163-166 (1967). Despite the fact that the tax had operated with absolute geographic uniformity during the periods for which refund claims were filed, the district court found that the uniformity issue was ripe for decision because production of "exempt Alaskan oil" ultimately did commence after this litigation was initiated. In support of its decision, the district court relied on *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936), *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923), and *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), in which this Court had held that constitutional issues raised in suits for injunctive relief were ripe for decision upon a showing that the alleged constitutional injury was, in fact, about to be incurred by the litigants.

But those precedents have no application to this case, where the only statutory basis for the district court's jurisdiction is 28 U.S.C. 1346(a)(1), which permits actions to be maintained against the United States for the recovery of taxes alleged to have been erroneously or illegally assessed and collected. Pursuant to the terms of Section 7422(a) of the 1954 Code, the district court's jurisdiction in a refund suit is limited to those instances in which the taxpayer has filed an administrative refund claim. See *United States* v. *Felt & Tarrant Co.*, 283 U.S. 269, 272-273 (1931); *Biggs* v. *United States*, 326 F. Supp. 749, 751 (E.D. Ky. 1971); cf. *Rosengarten* v. *United States*, 181 F. Supp. 275, 279 (Ct.

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[35] The doctrine of ripeness is closely related to, though broader than, the general requirement of "standing"—*i.e.*, that a person challenging the statute be adversely affected by its alleged unconstitutional operation. See, *e.g.*, *Blum* v. *Yaretsky*, No. 80-1952 (June 25, 1982), slip op. 9 n.13; *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 37-39 (1976). Here, the producer/royalty holder appellees concededly had standing to challenge the imposition of the taxes for the periods for which refund claims had been submitted. But the standing of appellees is of little significance in light of the fact that the district court lacked jurisdiction to adjudicate the validity of the tax for those periods (see pp. 41-42, *infra*).

Cl.), cert denied, 364 U.S. 822 (1960). Accordingly, the district court's jurisdiction was limited to the periods for which claims for refund had been filed, *i.e.*, March 1 through December 31, 1980.[36]

2. Moreover, the question is not simply one of ripeness, as such, but whether, assuming the district court's reading of the Uniformity Clause is correct, the Act could be deemed to violate the Clause when, in fact, during the only periods for which the legality of the tax can be questioned in this refund suit, the taxing provisions operated with precisely the same force and effect in every place where the subject was found. Since the assertedly defective provisions remained wholly inoperative during the period for which the taxes in question were collected, there was not simply "substantial uniformity," but absolute geographical uniformity with respect to the imposition of those taxes during those periods. Hence, appellees suffered no injury from the alleged unconstitutionality of the exemption.

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[36] Insofar as appellees' claims for declaratory and injunctive relief with respect to the operation of the tax in later periods are concerned, the requisite statutory consent to the maintenance of such suits against the United States is lacking (see *United States* v. *Sherwood*, 312 U.S. 584, 586-587 (1941); *Dugan* v. *Rank*, 372 U.S. 609, 617-618 (1963)) and such relief is expressly barred by the Anti-Injunction Act (Section 7421(a) of the Internal Revenue Code of 1954) and the tax exception to the Declaratory Judgment Act (28 U.S.C. (Supp. V) 2201). The bar of the Anti-Injunction Act is subject to a narrow exception where (1) under no circumstances could the United States prevail on the merits of its claim; and (2) there is no other adequate legal remedy. *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, 7 (1962); *Bob Jones University* v. *Simon*, 416 U.S. 725 (1974). Even if the exception were otherwise applicable, however, the doctrine of sovereign immunity would bar this suit, where the only named defendant was the United States. See *Buck* v. *United States*, 466 F.2d 481 (10th Cir. 1972); *Matya* v. *United States*, 478 F.2d 330 (8th Cir. 1973). Moreover, because any taxpayer actually subject to the tax is free to file the requisite refund claim and then to bring a refund suit under 28 U.S.C. 1346(a)(1), the second aspect of the *Enochs* v. *Williams Packing Co.* requirement would, at all events, not be satisfied. Finally, it is highly questionable whether the association and state appellees would have standing to seek such relief. See *Simon* v. *Eastern Ky. Welfare Rights Org.*, *supra; Massachusetts* v. *Mellon*, 262 U.S. 447, 484-486 (1923); *Florida* v. *Mellon*, 273 U.S. 12, 18 (1927).

Had Congress exempted oil produced in the State of Hawaii, an area in which oil never has been found, its action might be characterized as somewhat bizarre and irrational, but it could hardly be contended that such an exemption would cause the tax to run afoul of the Uniformity Clause. By the same token, until such time as "exempt Alaskan oil" was actually produced (and, thus, until such time as its producers were actually given the benefit of the exemption), the provisions here in question stand on the same footing. Hence, appellees are not entitled to refunds for the periods in suit.[37]

## II

### EVEN IF THE ALASKAN OIL EXEMPTION VIOLATES THE UNIFORMITY CLAUSE, THE REMAINING PROVISIONS OF THE WINDFALL PROFIT TAX ARE SEPARABLE AND SHOULD BE UPHELD

1. Assuming that the exemption provisions of Sections 4991(b)(3) and 4994(e) violate the Uniformity Clause (even for periods prior to December 1981), the district court nevertheless erred in holding the entire tax invalid. The general rule is that (*Lynch* v. *United States*, 292 U.S. 571, 586 (1934)):

> * * * a statute bad in part is not necessarily void in its entirety. A provision within the legislative power may be allowed to stand if it is separable from the bad. But no provision however unobjectionable in itself, can stand unless it appears both that, standing alone, the provision can be given legal effect and that the legislature intended the unobjectionable provision to stand in case other provisions held bad should fall. *Dorchy* v. *Kansas*, 264 U.S. 286, 288, 290.

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[37] See also *Regional Rail Reorganization Act Cases*, *supra*, 419 U.S. at 159-160. There, apart from the other reasons stated for rejecting the plaintiffs' contention that the Rail Act violated the bankruptcy uniformity requirement, the Court noted that the statute had operated with absolute geographic uniformity in any event because no other railroad reorganization proceedings were pending during the period the Act was in effect.

See Stern, *Separability and the Separability Clauses in the Supreme Court*, 51 Harv. L. Rev. 76, 77 (1937).

It is firmly established that, in the absence of compelling evidence to the contrary, the Court will presume that Congress intends the unconstitutional portion of a statute to be severed from the remainder. "'The cardinal principle of statutory construction is to save and not to destroy'." *Tilton* v. *Richardson*, 403 U.S. 672, 684 (1971) (plurality opinion), quoting *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937). The invalid portions of a statute are to be severed "'[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not'." *Buckley* v. *Valeo*, 424 U.S. 1, 108-109 (1976), quoting *Champlin Refining Co.* v. *Corporation Commission*, 286 U.S. 210, 234 (1932).

There can be little doubt that the portions of the statute remaining after the excision of Sections 4991(b)(3) and 4994(e) can be given legal effect standing on their own. If the Alaskan exemption provisions were removed, then all oil production would be taxed under the remaining statutory provisions. Profit from production that would otherwise qualify as "exempt Alaskan oil" would then be taxed as "tier 3 oil" (unless, of course, it fell within one of the other exemptions in the statute).[38] Moreover, despite the district court's assertion that "the legislative history and spirit remains somewhat of an enigma in this case" (J.S. App. 9a), that history makes it abundantly clear that this is not (*United States* v. *Raines*, 362 U.S. 17, 23 (1960)):

> that rarest of cases where this Court can justifiably think itself able confidently to discern that Congress would not have desired its legislation to stand at all unless it could validly stand in its every application.

Section 7852(a) of the 1954 Code provides that "[i]f any provision of this title [26 U.S.C.], or the application thereof to any person or circumstances, is held invalid, the remain-

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[38] Except for taxable Sadlerochit oil, all oil produced in the geographical area falling within the Alaskan exemption constitutes "newly discovered oil," as defined by Section 4991(e)(2).

der of the title, and the application of such provision to other persons or circumstances, shall not be affected thereby." This separability provision has been included in the tax laws in virtually identical terms since the Revenue Act of 1921, ch. 136, Section 1403, 42 Stat. 321. The presence of this clause creates a strong presumption that Congress intended the valid portions of the Internal Revenue Code to be separated from invalid portions.[39] See *McElroy* v. *United States ex rel. Guagliardo*, 361 U.S. 281, 283 (1960); *Electric Bond & Share Co.* v. *SEC*, 303 U.S. 419, 434 (1938); *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 312-313 (1936).

Moreover, the pertinent legislative history of the Windfall Profit Tax confirms that Congress understood that in the event the Alaskan exemption provisions were declared invalid, the saving provision of Section 7852(a) would become fully applicable. During the debate on the tax, several Senators voiced reservations as to the constitutionality of the Alaskan oil exemption. 126 Cong. Rec. S2771, S2773-2774 (daily ed. Mar. 20, 1980); S2825-2828 (daily ed. Mar. 21, 1980); S2854-2855 (daily ed. Mar. 24, 1980) (comments and submissions of Senators Bellmon, Boren, Schmitt, and Stevens). In response, Senator Long, the Chairman of the Finance Committee and the floor manager of the bill in the Senate, expressed the view that the bill satisfied the requirements of the Uniformity Clause. 126 Cong. Rec. S3055-3056 (daily ed. Mar. 26,1980). But, recognizing the possibility that the "exempt Alaskan oil" provisions might be held to violate that requirement, he noted (*id.* at 3056):

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[39] The presumption of separability is especially appropriate in the case of revenue measures, even without an express separability clause. As the Court noted in *Field* v. *Clark*, 143 U.S. 649, 696-697 (1892):

> Unless it be impossible to avoid it, a general revenue statute should never be declared inoperative in all its parts because a particular part relating to a distinct subject may be invalid. A different rule might be disastrous in the financial operations of the government, and produce the utmost confusion in the business of the entire country.

> It is our thought that there is a separability clause in the Internal Revenue Code which applies to everything in the code and to all amendments to it, and we would expect and we would intend, if the courts should find a constitutional objection valid with respect to the Alaskan oil exemption, that the Alaskan oil exemption should not stand and that Alaskans or those producing oil in Alaska would have to pay the same 30 percent tax on new oil that everybody else would have to pay.

No contrary views were expressed as to the applicability or operation of Section 7852(a) by any proponent or opponent of this legislation in either the House or the Senate. There is nothing "enigmatic" in this statement by the chairman of one of the two committees responsible for drafting this legislation.[40] Senator Long's statement demonstrates that Congress was fully aware that the provisions added to the Internal Revenue Code by the Crude Oil Windfall Profit Tax Act would be subject to the "separability clause" of Section 7852(a), and that if the Alaska oil exemption were held invalid the exemption would be severed and the windfall profit tax itself preserved.[41]

Finally, even apart from this explicit statement as to the applicability of the separability clause of Section 7852(a), it can hardly be thought that Congress would not have enacted a windfall profit tax if it could not have provided the Alaskan exemption in its present form.[42] The legislative

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[40] As a statement of one of the bill's sponsors, Senator Long's explanation deserves to be accorded substantial weight in interpreting the statute. *FEA* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976); *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 394-395 (1951).

[41] Senator Long also expressed the view that, in the event the exemption were held invalid and severed, Congress might then consider whether to devise other relief for high-risk, high-transportation-cost oil production. 126 Cong. Rec. S3056 (daily ed. Mar. 26, 1980).

[42] Senator Stevens of Alaska voted against passage of the Act (126 Cong. Rec. S3151 (daily ed. Mar. 27, 1980)), as did Alaska's only House member, Representative Young (126 Cong. Rec. H1861 (daily ed. Mar. 13. 1980)). Senator Gravel of Alaska did not vote on the matter. 126 Cong. Rec. S3151 (daily ed. Mar. 27, 1980). Since no member of Alaska's congressional delegation voted in favor of the Act, taxpayer and association appellees err (Mot. to Aff. 26-28) in suggesting that

history of the Act makes clear that the adoption of the tax was the price exacted for the concomitant decontrol of domestic oil prices, and that the main purpose of the tax was to raise revenue. See H.R. Rep. No. 96-304, *supra*, at 4, 7; S. Rep. No. 96-394, *supra*, at 6-7. There is no doubt, of course, that Congress was concerned that the general imposition of a windfall profit tax with respect to "newly discovered oil" could have a deterrent effect on future discovery and development, particularly in the case of new Alaskan oil. But there is no indication in the legislative history that this was such a critical consideration that Congress would have entirely foregone the adoption of this tax, and the $227.3 billion in revenue it was estimated to produce over a 12-15 year period, if it could not have provided an exemption for North Slope Alaska oil.[43]

In light of the continuing presence of a separability clause in the Internal Revenue Code, as well as the legislative history, the district court erred in ascribing significance (J.S. App. 8a) to the fact that a separate separability clause was not contained in the Act itself. There was simply no reason for Congress to add a separability clause to the Act in order to preserve those provisions of it that amended or were added to the Internal Revenue Code. Section 7852(a) has been held applicable to amendments to the 1954 Code as well as to provisions that were included in the original 1954 recodification of the internal revenue laws. See *Sipes* v. *United States*, 321 F.2d 174, 178 (8th Cir.), cert. denied, 375 U.S. 913 (1963) (amended provision of 1954 code); *United States* v. *Castro*, 413 F.2d 891, 894 (1st Cir.1969) (original provision of 1954 Code). Thus, when the

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the Alaska oil exemption was the price to obtain the support of the Alaska representatives for passage of the Act.

[43] The district court took pains to make clear its view that its holding would not affect any of the remaining provisions of the Act not directly related to the imposition of the windfall profit tax (see J.S. App. 16a-17a). But it is far more questionable whether Congress would have intended to confer the benefits of the energy conservation and production measures provided by Title II of the Act, the low-income energy assistance provided for by Title III or, indeed, possibly any of the relief measures provided by Title IV of the Act, if the revenues to be generated by Title I would not be forthcoming.

windfall profit tax provisions of Section 4986 through 4998 were added to the Internal Revenue Code, each of those provisions became subject to the separability clause of Section 7852(a) to the same extent as any other provision of the Code. As we have noted (*supra*, pp. 45-46), that was the precise understanding expressed by Senator Long during the debate on the uniformity question.[44]

2. In refusing to apply the separability clause of Section 7852(a), the district court reasoned (J.S. App. 9a-10a) that it would be engaging in impermissible judicial legislation if it extended the tax to crude oil producers that Congress intended to exempt. But the district court engaged all the more so in judicial legislation when it declined to enforce *any* portion of this statute after finding one portion invalid. That holding flouts the legislative history that strongly establishes a congressional preference that the invalid portion be severed and the remaining provisions of the Act enforced. While the district court's ruling follows precedents of an earlier era (see, *e.g.*, *United States* v. *Reese*, 92 U.S. 214 (1875); *Employers' Liability Cases*, 207 U.S. 463 (1908); *Trade-Mark Cases*, 100 U.S. 82 (1879)) when the courts adhered to a rigid separability rule that "required invalidation of an entire statute if any part of it was unconstitutionally broad, unless its different parts could be read as wholly independent provisions" (*Griffin* v. *Breckenridge*,

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[44] In its Mot. to Aff. 15-16, appellee State of Louisiana urges that the provisions of Section 7852(a) serve only to preserve the preexisting provisions of the Internal Revenue Code of 1954, and that the provision to be nullified is "the Act" that added unconstitutional provisions. On this theory, of course, the provisions added to the Code by the other titles of the Act would also presumably be nullified, a course the district court declined to take (see n. 13, *supra*).

In marked contrast, the Taxpayer and Association appellees assert (Mot. to Aff. 21) that the exemption itself would be perfectly valid if it stood on its own, and that Section 7852(a) should therefore be applied to strike down the entire windfall profit tax (thereby preserving the "valid" exemption). Surely, however, Section 7852(a) was intended to preserve the revenue by avoiding such drastic remedies, not to require them. Moreover, Senator Long, without contradiction, specified how Section 7852(a) was intended to apply if the Uniformity Clause were deemed violated.

403 U.S. 88, 104 (1971)), "[t]his Court has long since firmly rejected that rule * * *" (*ibid.*).

Finally, the district court's suggestion (J.S. App. 9a-10a) that the courts are powerless to apply a separability clause or general severability principles in such a way as to strike down a constitutionally invalid tax exemption without striking down the tax itself is contrary to *Utah Power & Light Co.* v. *Pfost*, 286 U.S. 165 (1932). There, a state tax statute containing a separability clause was similarly challenged on the ground that an exemption provision in the statute was unconstitutional. While the Court ultimately found it unnecessary to decide whether the exemption was actually invalid, it squarely rejected the contention that a defect in the exemption provisions would render the entire taxing statute unconstitutional. In this respect, this Court held (286 U.S. at 185):

> The primary object of the statute, under review, plainly, is to raise revenue. The exemption * * * and the provisions for carrying that exemption into effect are secondary. We find no warrant for concluding that the legislature would have been content to sacrifice an important revenue statute in the event that relief from its burdens in respect to particular individuals should become effective. On the contrary, it seems entirely reasonable to suppose that if the legislature had expressed itself specifically in respect of the matter, it would have declared that the tax, being the vital aim of the act, was to be preserved even though the specified exemptions should fall for lack of validity.

Here, the same conclusion as to the "vital aim" of the windfall profit tax, if anything, finds even stronger support in the legislative history showing Congress' principal intent to collect $227.3 billion from those persons who enjoy the "windfall profit" resulting from the decontrol of crude oil prices.[45] Therefore, even if it is assumed that the Alaskan

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[45] Contrary to the argument of the Taxpayer and Association appellees (Mot. to Aff. 21), the severability question is not governed by *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239 (1931), rather than by the Court's subsequent decision in *Utah Power & Light Co.* v. *Pfost*, *supra*. Indeed, that prior decision did not involve either

**oil exemption is barred by the Uniformity Clause, the "separability clause" of Section 7852(a) saves the remaining provisions of the Act. Hence, the tax remains fully applicable to the appellees regardless of the merits of their Uniformity Clause contention.[46]**

---

an invalid statutory tax exemption, the application of a separability clause, or general separability principles. What was challenged in *Iowa-Des Moines National Bank* was not an unconstitutional statute, but an allegedly discriminatory administration of a state statute that, by its terms, provided for the imposition of the *same* rate of tax against the petitioner banks and their competitors. The administering officials, however, collected a lower rate of tax from the competitors, in violation of the state statute, the Equal Protection Clause of the Fourteenth Amendment, and the federal statutory requirement (Rev. Stat. 5219 (1878 ed.)) that state taxes on national banks be imposed on a nondiscriminatory basis. While the Court did conclude that the proper remedy there was to grant the petitioners a refund of the difference between the two rates rather than to compel the State to collect the higher (and correct) amount of the tax from their competitors (284 U.S. at 247), it is clear that it did not intend this holding as a strict rule against applying separability clauses in such a way as to eliminate invalid exemption provisions. Indeed, only a few months later in the same Term, in *Utah Power & Light Co.*, the Court rejected virtually the same argument as that advanced here without even mentioning the *Iowa Des Moines Bank* decision.

[46] Even if the district court correctly held that the "separability clause" of Section 7852(a) of the Code could not properly be applied in such a way as to result in the imposition of a tax on the members of the class that Congress had given the benefit of an invalid exemption, *i.e.*, the holders of economic interests in "exempt Alaskan oil," it should nevertheless have applied it in such a way as to preserve both the benefit of that exemption and so much of the tax as would apply with absolute geographic uniformity throughout the United States, with or without that exemption. See *Welsh* v. *United States*, 398 U.S. 333, 361 (1970) (Harlan, J., concurring): "Where a statute is defective because of underinclusion there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion." There is no reason, however, to extend such benefits to those persons who are not actually aggrieved by the impermissibly narrow classification. Cf. *Califano* v. *Wescott*, 443 U.S. 76, 89 (1979). Here, the only persons who are arguably "aggrieved" by the exemption provided by Sections 4991(b)(3) and 4994(e) are those who are the holders of economic interests in "newly discovered oil" located in geographic

## CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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FEBRUARY 1983

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areas other than those described in Section 4994(e), because that is the only category of oil that is not taxed with absolute geographic uniformity. All of the other categories provided for by the statute are taxed on precisely the same basis without regard to where such oil is found. Moreover, as the legislative history (*supra*, pp. 19-20) indicates, whether a tax should be imposed with respect to "newly discovered oil" was the most controversial aspect of this legislation. It can hardly be doubted that the tax would have been imposed with respect to the less controversial categories—as to which the element of "windfall profit" was more apparent—even if all "newly discovered oil" had been exempted. Accordingly, there was no reason for holding the taxing statute invalid insofar as it applies to categories other than "newly discovered oil."

No. 82-1066

IN THE
# Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, *Appellant*,

v.

HARRY PTASYNSKI, *et al.*, *Appellees*.

On Appeal from the United States District Court for the District of Wyoming

# BRIEF OF TAXPAYER APPELLEES

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## QUESTIONS PRESENTED

1. Whether an excise tax on domestic crude oil, which is specifically framed to apply throughout the United States except to a geographically defined area constituting three fourths of Alaska, violates the Uniformity Clause (Article I, Section 8, Clause 1) of the Constitution, which requires that "Excises shall be uniform throughout the United States."

2. Assuming the tax to be unconstitutional, whether the proper remedy is to sever the invalid tax in its entirety from the Internal Revenue Code so that Congress can frame new and uniform legislation of its own design or whether, as the Government contends, this Court should itself rewrite the tax to extend it to the Congressionally exempted areas of Alaska.*

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*The names of all parties in the Court whose judgment is under review are set forth in the caption of the District Court opinion (J.S., 1a). None of the corporate parties has a parent company, subsidiary (other than a wholly-owned subsidiary) or affiliate.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1066

UNITED STATES OF AMERICA, *Appellant*,

v.

HARRY PTASYNSKI, *et al.*, *Appellees*.

**On Appeal from the United States District Court for the District of Wyoming**

## BRIEF OF TAXPAYER APPELLEES

### STATEMENT

**A. The Tax and the Alaska Exemption**

The Government's brief (Gov. Br. 2-5) describes the general features of the tax imposed by Title I of the Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223, 94 Stat. 229 (hereafter referred to as the "Tax" or the "Windfall Profit Tax"). Its basic structure is succinctly depicted in the chart contained in the District Court's opinion (reprinted at J.S., App. A, 3a). The Tax is specifically identified by Congress as an excise tax. 26 U.S.C. Section 4986(a). It is levied, at rates ranging as high as 70 percent, on so-called "windfall profits"[1]

[1] The taxable amount, labelled "windfall profit" by the statute, is in fact unrelated to profit. It is basically the difference between the "removal price" (normally price at the wellhead) and the adjusted "base price," which depends upon the "Tier" to which the oil has been assigned and bears no necessary relationship to cost. See 26 U.S.C. §§ 4988(a), 4988(c) and 4989.

from production of oil in 49 states and about one-fourth of Alaska. However, contrary to the Constitution, the Tax is not "uniform throughout the United States." Art. I, Sec. 8, cl. 1.

The Act provides an exemption for oil produced in an area constituting approximately three-fourths of the State of Alaska. See map at App. A. Although the Act contains several exemptions, the Alaska exemption is the only one based upon the geographic location where the oil is produced.[2] "Exempt Alaskan oil" is defined as certain oil produced

> "(1) from a well located north of the Arctic Circle or from a reservoir from which oil has been produced in commercial quantities through such well, or
>
> (2) from a well located on the northerly side of the divides of the Alaska and Aleutian ranges and at least 75 miles from the nearest point on the Trans-Alaska Pipeline System." Section 4994(e).[3]

"Sadlerochit oil" (defined as oil produced from that part of the Sadlerochit reservoir located in the Prudhoe Bay oil field) is, however, excluded from the Alaska exemption. Sections 4994(e), 4996(d)(3).

The scope of the Alaska exemption is vast—not only in area but also in potential oil production sheltered from tax. The exempt area is larger than the combined areas of Texas and Louisiana. Official reports of the United States Geological Survey estimate that by 1986 production from *a single field* in the exempt region (the Kuparuk River field) will equal 250,000 barrels of oil per day. Geological Survey Circular 884 at 17 (1982). If that field were a separate state, such production

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[2] The governmental, charitable and Indian exemptions are based upon the identity of the owners of the production. See §§ 4994(a), (b) and (d). The "front-end tertiary oil" exemption is based on the producer's use of the proceeds to finance expensive tertiary production. See § 4994(c).

[3] The text above reflects technical clarifying amendments. See Technical Corrections Act of 1982, Pub. L. No. 97-448, 96 Stat. 2365. None of the amendments is relevant to this appeal.

would entitle it to rank *seventh* among the oil-producing states, behind only Texas, Louisiana, Oklahoma, California, Wyoming and the non-exempt portions of Alaska. The proven reserves of the Kuparuk River field, however, amount to only 7 percent of the estimated potential reserves attributable to the exempt region.[4] Estimated undiscovered reserves in the exempt area are 17.2 billion barrels, or 21 percent of such reserves for the entire United States.[5]

Without the Alaska exemption, the present Windfall Profit Tax would not have obtained Congressional approval. *All* the seriously considered bills in one form or another exempted Alaskan oil. See pp. 28-29, *infra*. Not only did every serious proposal effectively exempt Alaskan oil, but the adoption by the Senate of an explicit Alaskan exemption was critical both to the Senate's decision to extend the tax to newly discovered oil and to resolution of the stalemate in which the tax bill had become trapped. See pp. 31-33, *infra*.

**B. Proceedings Below**

Taxpayer appellees[6] brought suit seeking refunds of Windfall Profit Taxes paid on the grounds that the Tax is unconstitutional in violation of both the Uniformity Clause (Art. I, Sec. 8,

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[4] The proven reserves of the Kuparuk River field equal 1.25 billion barrels. See Oil & Gas Journal, March 14, 1983, p. 38. Estimated undiscovered reserves of the exempt area equal 17.2 billion barrels. See *Estimates of Undiscovered Recoverable Conventional Resources of Oil and Gas in the United States*, Geological Survey Circular 860 (1982) at 74-79.

[5] See *id.* at 2, 74-79. The Government seeks to trivialize the scope of the exemption (Gov. Br. 21 n.28), by asserting that "most" of the reserves covered by this estimate are attributable to federal offshore areas to which the Uniformity Clause is inapplicable. However, even if limited to *state* reserves in the exempt area, the reserves equal 6.1 billion barrels or 7.4 percent of such reserves for the United States. Geological Survey Circular 860, pp. 2, 74-79 (1982).

[6] Harry Ptasynski, John Partridge, Berton W. Avery, Goldie Avery, Frederick S. Johnson, and Calvin Petroleum Corporation.

cl. 1) and the Fifth Amendment prohibitions against deprivation of property without due process of law and against the taking of property without just compensation.[7] The principal taxpayer action (C80-302) covered taxes paid for March 1980. A later suit filed by taxpayer appellee Partridge (C82-050), covered taxes paid through the year 1980 and was consolidated with the principal action. See J.S., App. A, 2a.[8]

On November 4, 1982, the District Court awarded refunds to the taxpayer appellees on the grounds that the Tax violated the Uniformity Clause. It held that the Constitution requires that

> "in each state where crude oil is found, the production and removal of that crude oil be subject to the tax and taxed at the same rate. The windfall profits tax ignores this requirement. The Act, on its face, says that one state, Alaska, is not subject to the same tax, at the same rate as all the other states. This is a clear violation of the constitutional requirement of uniformity." J.S., App. A, 7a.

With respect to separability, the District Court determined that Title I of the Crude Oil Windfall Profit Tax Act of 1980 was unconstitutional and must be declared invalid. It rejected the Government's suggestion that it treat the Alaska exemption as "separable" and extend the Tax to the exempt portions of Alaska.[9] Recognizing that the separability issue turned on

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[7] The Fifth Amendment claim is not at issue in this Court in view of the District Court's decision in the taxpayers' favor on the issues of uniformity and separability. See J.S., App. A, 10a.

[8] The association appellees, listed in the caption of the District Court's decision (J.S., App. A, 1a), joined as plaintiffs below. The District Court found them to lack standing as plaintiffs, but ordered that they should remain as intervenors. In addition, the District Court granted motions to intervene by the States of Louisiana and Texas. See J.S., App. A, 2a.

[9] It also implicitly rejected the Government's alternative proposal that the court extend the exemption "to production in all areas similar to the Arctic Circle or located more than 75 miles from a pipeline connection." See Reply Brief for the Defendant United States of America and in Opposition to Motions for Summary Judgment, p. 10.

legislative intent, the District Court found that it was "clear that the Alaska exemption was the result of negotiations and compromise, and that the Act as it exists today would not have been passed without the invalid Alaska provision." J.S., App. A, 9a.

Since the decision below, the well-publicized drop in the world price of crude oil has dramatically changed the expected Tax revenues. Originally expected to capture about $21 billion a year, the Tax is now expected to yield only about $5 billion per year or $30 billion over the next six years. See Government's Motion to Set the Case for Oral Argument During the Present Term of Court, p. 2. The administrative costs[10] of the tax and uncertainties as to its application remain serious even today, three years after its adoption.[11] In light of these developments, it is hardly surprising that the Tax's chief sponsor, Senator Russell B. Long, has unequivocally repudiated the product of his strenuous legislative efforts, "The Windfall Profits Tax has outlived its usefulness. It is a hefty burden on production . . . . and the courts would do the nation a favor by declaring it unconstitutional." News Release from the office of Senator Russell B. Long, November 5, 1982.

## SUMMARY OF ARGUMENT

### I.

The Uniformity Clause of the United States Constitution states, without qualification, that "Excises shall be uniform throughout the United States." Art. I, Sec. 8, cl. 1. The Wind-

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[10] See *Report to the Secretary of the Treasury: Uncertainties About the Definition and Scope of the Property Concept May Reduce Windfall Profit Tax Revenues*, p. 14 (GAO/GGD-82-48, May 13, 1982); see also 48 Fed. Reg. 2800 (Jan. 21, 1983).

[11] There are at least eleven categories of oil and at least three categories of taxable owners. As to each taxpayer, the determination of taxable status, adjusted base price and tax rate turn upon the location of the taxpayer's oil in this matrix.

fall Profit Tax is an excise tax which is not geographically uniform throughout the United States because it exempts oil production in a geographically defined area constituting three-fourths of Alaska. The Tax is invalid since it violates both the plain language of the Constitution and this Court's clear and consistent interpretation of the Uniformity Clause as requiring geographic uniformity. *Hylton* v. *United States*, 3 U.S. (3 Dall.) 171 (1796); *Head Money Cases*, 112 U.S. 580 (1884); *Knowlton* v. *Moore*, 178 U.S. 41 (1900).

The Government's proposed "rational basis" test is without support either in the Constitutional language or precedent, and its adoption would undermine the Uniformity Clause. This Court's decisions unequivocally state that the Uniformity Clause requires geographic uniformity. No case sustains a non-uniform excise tax because the disparity is "rational." On the contrary, the cases clearly demonstrate that the Uniformity Clause imposes a rule of *per se* invalidity. *Downes* v. *Bidwell*, 182 U.S. 244 (1901); *Railway Labor Executives' Ass'n* v. *Gibbons*, 455 U.S. 457 (1982).

The Government's position rests on an elaborate word-play. It frequently imputes to appellees a notion that the Clause prohibits Congress from "taking geographic considerations into account," and then cites, as supporting its mistaken inference, decisions of this Court upholding Congress' power to do so. (Gov. Br. 9, 10, 13, 27, 32.) But appellees have always maintained, consistently with the cases, that the Clause permits Congress to take "geographic considerations into account" when framing tax legislation in terms of factors that exist in different concentrations in particular regions. Appellees have equally insisted, in accord with the cases, that the Clause denies Congress the power to take "geographic considerations into account" in the sense of framing tax legislation in terms of geographic boundaries.

The Constitution's requirement of geographic uniformity constrains Congress to address tax issues in terms of policy rather than naked political power. Congress is free to consider

any circumstance it deems relevant (such as high production costs), whether or not that circumstance is manifested disproportionately in some specific region. But by prohibiting a disparity in tax based on geographic boundaries, the Uniformity Clause forces Congress to act—and even perhaps to think—in terms of such policy factors.

There is no basis for the Government's suggestion that since the Tax applies to *some* Alaskan oil, it may, consistent with the Uniformity Clause, exempt the remaining three-fourths of Alaska. Gov. Br. 37-39. Not one of this Court's discussions of the Uniformity Clause even remotely suggests that partial non-uniformity is valid, and that violation occurs only if 100 percent of some state is treated differently from other states. Instead, the cases show that full geographic uniformity is required. *Head Money Cases*, 112 U.S. 580, 594 (1884); *Knowlton* v. *Moore*, 178 U.S. 41, 84 (1900).

The Windfall Profit Tax and the Alaska exemption were effective during the period for which refunds are claimed, and violated the Uniformity Clause throughout that period. The Government asserts that the Tax operated with "absolute geographic uniformity" during 1980, and incorrectly argues that the Tax was uniform until exempt oil was actually produced. This argument, however, ties the Government to the bizarre conclusion that on December 13, 1981, the Act could be constitutional but could become unconstitutional one day later, when exempt oil was first produced. If exempt Alaskan wells ceased operation for a week, the Tax on this theory would abruptly become lawful again for that period.

In addition, the Government's theory ignores that the Tax's non-uniformity had immediate consequences: it increased the value of the investments of appellees' competitors who held interests in the exempt areas and encouraged further development in those areas. Congress designed the Windfall Profit Tax to exclude areas known at the time to have vast oil reserves and intended specifically to encourage investment and production in those areas. This exemption rendered the Tax invalid from the moment of enactment.

## II.

Congressional intent determines whether an unconstitutional statute may stand in part or must fall as a whole. The latter course is appropriate if "it is evident that the legislature would not have enacted the legislation without the invalid portion." *Zobel* v. *Williams*, 102 S. Ct. 2309, 2315 (1982), citing *Buckley* v. *Valeo*, 424 U.S. 1 (1976). In this instance, the exemption of three-fourths of Alaska was by every possible measure an integral, critical aspect of the Tax. Every seriously considered bill exempted such oil directly or indirectly; the exemption arose out of a deliberate trade-off between conflicting Congressional purposes; and adoption of the exemption in the Senate was critical to resolution of a legislative impasse that might have precluded enactment of *any* tax. A single, isolated remark on the Senate floor cannot overcome the overwhelming evidence that Congress insisted upon the exemption of Alaska and would not desire this Court to uphold the invalid Tax by extending it to exempt oil.

When a tax statute (or tax enforcement practice) is illegal simply because the legislature (or enforcing agency) has drawn a distinction that it is not legally entitled to draw, this Court's holdings have uniformly and unequivocally rejected the remedy of extending the tax. *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239 (1931). Any such remedy would disserve the Constitution by removing the incentive of prospective plaintiffs to litigate unconstitutional statutes or practices. The dictum in *Utah Power and Light* v. *Pfost*, 286 U.S. 165 (1932), relied on by the Government, involved an exemption provision that was peripheral to the legislation involved; no such label can be applied to the Alaska exemption in light of its purpose and legislative history.

The straightforward application of the general separability clause of the Internal Revenue Code, 26 U.S.C. § 7852(a), in this case is to invalidate the entire Tax. The Government's argument rests on the mistaken premise that, at worst, the Alaska exemption itself is the unconstitutional provision: it is

not. The unconstitutional provision to be severed from the Code is the Windfall Profit Tax by reason of its non-uniformity.

Congress is best able to resolve the peculiarly legislative issues that are involved in remedying the defective Tax. Any extension of the Tax will have a dramatic effect on taxpayers and on the prospects for domestic energy independence. Judicial extension of the Tax to Alaska would unfairly defeat the expectations of those who have invested hundreds of millions of dollars in the exempt area in reliance upon the exemption. Each of the Government's alternative proposed remedies would also require this Court to resolve difficult subsidiary problems, which are properly left to the legislative branch. Congress possesses broad power to enact substitute legislation, and in the absence of an express mandate to the contrary, one may safely conclude that Congress would desire to resolve these issues itself.

## ARGUMENT

### I. THE WINDFALL PROFIT TAX VIOLATES THE UNIFORMITY CLAUSE.

#### A. The Constitutional Language, the Framers' Policy Concerns and this Court's Decisions All Support the District Court's Conclusion that the Windfall Profit Tax Violates the Uniformity Clause.

The starting point for interpretation of governing language, whether statutory or constitutional, is the language itself.[12] In this case, the Uniformity Clause of the Constitution provides:

> "The Congress shall have Power To lay and collect Taxes, Duties, Imposts, and Excises . . .; but all Duties, Imposts and *Excises shall be uniform throughout the United States*." Art. I, Sec. 8, cl. 1 (emphasis added).

The Windfall Profit Tax is an excise tax. Section 4986(a). As the Government admits, the Tax is not geographically uniform

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[12] See *Wright* v. *United States*, 302 U.S. 583, 587-589 (1938); *Williams* v. *United States*, 289 U.S. 553, 572-573 (1933); *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917).

throughout the United States, because it exempts oil production in a geographically defined area constituting three-fourths of Alaska. It is therefore invalid under the plain language of the Constitution. Gov. Br. 20, 28.

It is apparent, from the quoted language, that the framers of the Constitution intended to prohibit Congress from drafting excise tax classifications in terms of geographic *location*. This Court has consistently adhered to that straightforward interpretation of the Constitutional language, and this reading flows naturally from the very words of the Constitution: "Uniform" clearly means in the same amount; and "throughout the United States" is a geographic reference. Consequently, when the Uniformity Clause says that "Excises shall be uniform throughout the United States," it intends that a valid excise tax apply, at the same rate, in all portions of the United States where the object of taxation may be found.[13] Thus, judged by the touchstone of Constitutional language, the test to be applied is straightforward, and the Tax in this case does not comport.

Far from contradicting the language, the framers' intent confirms the requirement of geographic uniformity. The first recorded explanation of the Clause was that of Luther Martin, delegate to the Convention from Maryland, who had originally proposed the language that evolved into the Uniformity Clause. See Gov. Br. 24. Reporting to the legislature of Maryland in 1787, Martin said:

> "[There] is a provision that all duties, imports and excises shall be uniform—*that is to be laid to the same amount on the same articles in each state.*"[14]

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[13] Consonantly, the clause does not require "intrinsic" uniformity, *i.e.*, an identical *impact* on all sections of the country (as would be true only when the subject of taxation existed in equal proportions in all regions). *Knowlton* v. *Moore*, 178 U.S. 41, 83-106 (1900).

[14] 1 Elliot's Debates on the Adoption of the Federal Constitution 369 (1888) [hereinafter cited as Elliot's Debates] (emphasis supplied as quoted in Knowlton v. Moore, 178 U.S. 41, 106 (1900)).

Martin went on to explain the limitations of the clause: because it did not require intrinsic uniformity, Congress would be free to select objects of taxation that were rare in some states but abundant in others. *Id.*

The Court itself first interpreted the uniformity provisions shortly after adoption of the Constitution. In *Hylton* v. *United States*, 3 U.S. (3 Dall.) 171 (1796), Justice Paterson, who had served as a delegate to the Constitutional Convention from New Jersey, considered the Clause and explained the Court's preference for classifying taxes so that they would be covered by the requirement of uniformity rather than that of apportionment.[15] He emphasized that, in contrast to the "endless valuations and assessments" necessary for apportionment,

> "[t]he rule of uniformity . . . implies certainty. . . . The truth is, that *the articles taxed in one state should be taxed in another;* in this way the spirit of jealousy is appeased, and tranquility preserved; *in this way the pressure on industry will be equal in the several states*, and the relation between the different objects of taxation duly preserved." 3 U.S. (3 Dall.) at 180 (emphasis added).

In the *Head Money Cases*, 112 U.S. 580 (1884), the Court articulated its classic interpretation of the Uniformity Clause: A tax, it said, complies with the Uniformity Clause only if "it operates with the same force and effect *in every place* where the subject of it is found." 112 U.S. at 594 (emphasis added). Similarly, in the Court's most complete discussion of the clause, *Knowlton* v. *Moore*, 178 U.S. 41 (1900), it again concluded that the Clause refers "purely to a geographical uniformity." 178 U.S. at 96. In its words, the Uniformity Clause requires

[15] Taxpayer plaintiff claimed that a tax on carriages was "direct" and ought therefore to have been apportioned pursuant to Art. I, § 9, cl. 4. Instead, the Court held the tax to be indirect and governed by the uniformity requirement of Art. I, § 8, cl. 1.

> "that whatever plan or method Congress adopts for laying the tax in question, the same plan and the same method must be made operative throughout the United States; that is to say, that *wherever a subject is taxed anywhere, the same must be taxed everywhere throughout the United States, and at the same rate.*" *Id.* at 84 (emphasis added).

In subsequent cases, this Court has consistently held that the uniformity required is geographic uniformity. In *Florida* v. *Mellon*, 273 U.S. 12, 17 (1927), the Court stated that the Uniformity Clause requires "that the law shall be uniform in the sense that by its provisions *the rule of liability shall be the same in all parts* of the United States," (emphasis added), and in *LaBelle Iron Works* v. *United States*, 256 U.S. 377, 392 (1921), the Court construed the Clause as requiring "territorial" uniformity. See also *Fernandez* v. *Wiener*, 326 U.S. 340, 359-61 (1945).

The Constitution's requirement of geographic uniformity means that, in framing excise tax legislation, Congress will consider the issues in terms of policy rather than naked political power. Congress is free to consider any circumstance it deems relevant (such as high production costs), whether or not that circumstance is manifested disproportionately in some specific region. But by prohibiting a disparity in tax based on geographic boundaries, the Uniformity Clause forces Congress to act—and even perhaps to think—in terms of such policy factors, and not in terms of purely political, regional factors.

The present facts amply illustrate the wisdom of the Clause. Thus, to the extent that the Alaska exemption arises out of Congressional concern over the Tax's disincentive to oil production in adverse climates, then after invalidation of the Tax, Congress may wish to provide general exemptions for oil produced in areas that experience specified climatic conditions. Such a "cold weather" exemption, however, would in all likelihood benefit states other than Alaska, including Wyoming and other mountain states. Even if a "cold weather" exemption happened to affect only portions of Alaska, treatment

of the issue in that form would naturally invite Congress to consider whether *other* factors accounting for high costs—such as production from offshore wells or from great depths—should also enjoy special relief. Differences in transportation costs, which the Government also invokes to support the exception, could also be—and indeed are—reflected in the Tax. [16]

There is thus nothing to the Government claim that enforcement of the Uniformity Clause according to the traditional understanding would "disabl[e] the Congress and the President from dealing with great national concerns, such as energy development and federal revenues, in a discerning, nondiscriminatory way. . . ." Gov. Br. 30. As just explained, this very tax illustrates how readily Congress could achieve such legitimate ends—without impinging on the principle of uniformity—by providing exceptions framed in terms of severe climate, high production costs, or other relevant functional variables. For 200 years Congress has managed to comply with the requirement of geographic uniformity; the Government offers no basis for a belief that the Clause has suddenly become an obstruction to sound tax legislation.

The Government repeatedly suggests that appellees have interpreted the Uniformity Clause to prohibit Congress from taking "geographical considerations into account." Gov. Br. 9, 10, 13, 27, 31. Appellees have never suggested any such thing. Where factors relevant to the purposes of tax legislation are concentrated in a specific geographic area (such as, for example, severe climate or any circumstance by virtue of which

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[16] The present tax formula already takes account of the higher cost of transporting Alaskan oil. The price paid for such oil at the wellhead is normally less than the mainland price, reflecting the added transportation costs that the purchaser will incur (*e.g.*, if mainland oil is priced at $28 and the transportation cost from Alaska is $8.00, Alaskan oil will sell at the wellhead for $20). Since the wellhead price of Alaskan oil is therefore less, so is the tax paid, as it is levied on the wellhead price (less a fixed statutory amount, the adjusted base price). See p. 1, n.1, *supra*.

the tax would especially tend to discourage the production of oil), Congress is, of course, entirely free to provide exemptions framed in terms of those *factors*. All that the Uniformity Clause prohibits is its delineating the exemption in terms of geographic boundaries.

The Government correctly notes that until the decision of the District Court in this case no tax statute had ever been held to violate the Uniformity Clause. Gov. Br. 8, 13. The Government seems to regard that fact as supporting its proposal that the Court supplant its 200-year-old rule with the Government's complex alternative. Quite the contrary, the 200 years of experience suggest the wisdom of continued adherence to the established rule. This is a constitutional success story; the Clause need not be rewritten.

**B. The Government's Proposed "Rational Basis" Test Is Without Support and Would Undermine the Uniformity Clause; Nor Is There Any Basis for Suggesting That a Majority-Approved Preference Is a Valid Exception.**

**1. There Is No "Rational Basis" Exception.**

The unqualified language of the Uniformity Clause, and its consistent interpretation by this Court, establish that "wherever a subject is taxed anywhere, the same must be taxed everywhere throughout the United States, and at the same rate." *Knowlton* v. *Moore*, 178 U.S. 41, 84 (1900). Despite this clear and consistent interpretation, the Government suggests that geographically non-uniform excise taxes should be upheld if the geographic disparity is supported by a "rational basis" or "rational considerations" or "reasonable basis." Gov. Br. 27, 31, 32, 33.

The cases unequivocally and without qualification state that the Clause requires geographic uniformity. None sustains a non-uniform excise tax because the disparity is "rational." On the contrary, *Downes* v. *Bidwell*, 182 U.S. 244 (1901), clearly demonstrates the Court's view that the Uniformity Clause imposes a rule of *per se* invalidity.

After the United States acquired Puerto Rico in the Spanish-American War, Congress sought to establish and finance civil government in Puerto Rico. In the Foraker Act, 31 Stat. 77-78, ch. 191 (1900), it imposed a special duty of 15 percent on all goods entering the United States from Puerto Rico or entering Puerto Rico from the United States, and earmarked the proceeds for the task of governing the island. This different treatment was not merely "rational" but was the product of "careful" consideration by Congress. *Id.* at 284.[17] But in upholding the tax, the Court in *Downes* did not in any respect rely on the justifications considered by Congress. Instead, it expressly stated that the tax *must fall* unless it could be established that for purposes of the Uniformity Clause Puerto Rico was not part of the United States:

> "If Porto Rico [sic] be a part of the United States, the Foraker Act imposing duties upon its products is unconstitutional, not only by reason of a violation of the uniformity clause, but because by section 9 'vessels bound from one State' cannot 'be obliged to enter, clear, or pay duties to another.' " *Id.* at 249.

The Court then proceeded to sustain the tax on the ground that a territory such as Puerto Rico was not part of the United States for purposes of the Uniformity Clause. This analysis required approximately 40 pages in the United States Reports. See 182 U.S. at 247-87. A concurring opinion devoted another 57 pages to the same issue. See 182 U.S. at 287-344. And dissenters devoted another 44 pages to the same issue. See 182 U.S. at 347-91. Yet all Justices were fully aware of the special factors which were considered by Congress and which amply justified the use of a special tax system for Puerto Rico. Not a single Justice argued that those differentiating factors would sustain the tax. Obviously, the Justices would not have

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[17] As the Supreme Court noted, Puerto Rico had had no property tax; the federal internal revenue tax was far heavier than any to which the island had been subjected under Spanish rule; and the island's former principal source of revenue had been duties. *Id.*

written virtual treatises on the status of territories had they thought that factors supporting special treatment of Puerto Rico—factors clearly articulated in a single page (182 U.S. at 284)—could save the tax.

Only recently, in *Railway Labor Executives Ass'n* v. *Gibbons*, 455 U.S. 457 (1982), this Court flatly rejected a claim—under the corresponding uniformity provision of the Bankruptcy Clause[18]—identical to the Government's "rational basis" theory in this case. The Court struck down the Rock Island Transition and Employee Assistance Act ("RITA"), which had sought to establish special bankruptcy rules for the Chicago, Rock Island and Pacific Railway Company (the "Rock Island"). The Court in *Railway Labor Executives'* made clear that the rule applied was one of *per se* invalidity, for it held that a bankruptcy law applying to only one debtor was *necessarily* invalid, without regard to possible justifications. "A bankruptcy law, such as RITA, confined as it is to the affairs of one named debtor can hardly be considered uniform." *Id.* at 473. The majority also noted, in words equally applicable here, that

> "[t]he issue is not whether Congress has discriminated against the Rock Island estate, but whether RITA's employee protection provisions are uniform bankruptcy laws. *The uniformity requirement of the Bankruptcy Clause is not an Equal Protection Clause for bankrupts.*" *Id.* at 470 n.11 (emphasis added).

In arguing for "rational" non-uniformity, the Government relies heavily on a mistaken interpretation of the *Head Money Cases*, 112 U.S. 580 (1884). Congress had levied a charge on alien passengers entering the United States by vessel, and the court upheld the charge against a challenge under the Uniformity Clause. Writing for the court, Justice Miller explained that a tax was uniform within the meaning of the Clause only "when it operates with the same force and effect in every place

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[18] Article I, Sec. 8, cl. 4 of the Constitution empowers Congress "[t]o establish . . . uniform laws on the subject of Bankruptcies throughout the United States."

where the subject of it is found." *Id.* at 594. He also observed that the charge in question applied "to all *ports* alike." *Id.* at 595. The contrast with the present case could not be sharper. The Windfall Profit Tax does *not* apply to every "oil well alike," or to every "oil well with high production costs alike." It applies to newly discovered oil in 49 states and one-fourth of Alaska, and not at all to such oil in the exempt three-fourths of Alaska.

The Government further argues that the charge in *Head Money* "could apply only in states having sea ports (a matter necessarily determined by consideration of their geography."). Gov. Br. 31. Appellees, however, have never questioned that Congress may use functional tax classifications that result in different consequences for different localities and virtually every concept Congress might use—oil, vessels, port, income, cold weather—would affect different regions differently. *Head Money* and later court decisions confirm that the Uniformity Clause does not require "intrinsic uniformity" (112 U.S. at 594-95). Here, however, Congress has not spoken in such terms (*e.g.*, exempting oil produced where specific climate conditions are present) but has framed the tax in terms of express geographical boundaries. This the Uniformity Clause forbids.[19]

The Government's "rational basis" exception also finds no support in the *3R Act Cases*, 419 U.S. 102 (1974). As this Court

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[19] Lest there be any doubt of Justice Miller's meaning in the *Head Money Cases*, we may look to his lectures on the Constitution, delivered during the winter of 1889 and early spring of 1890. In the lectures, published posthumously as *Lectures on the Constitution of the United States* (1891), Justice Miller said (*id.* at 240):

> "They [taxes covered by the Uniformity Clause] are not required to be uniform as between the different articles that are taxed, but uniform as between the different places and different States. Whiskey, for instance, shall not be taxed any higher in the State of Illinois, or Kentucky, where so much of that article is produced, than it is in Pennsylvania. The tax must be uniform on the particular article; and it is uniform within the meaning of the constitutional requirement if it is made to bear the same percentage over all the United States."

explained in *Railway Labor Executives'*, the *3R Act Cases* represented a situation in which the requirement of geographic uniformity was met fully in substance, if not in form:

> "Since no railroad reorganization proceeding was then pending outside of the region defined by the Regional Railroad Reorganization Act (3R Act), 87 Stat. 985, 45 U.S.C. § 701 *et seq.* the Act in *fact* operated uniformly upon all railroads then in bankruptcy proceedings." 455 U.S. at 469-70 (emphasis added).

To underscore the point, the Court continued: "Unlike the situation in the *3R Act Cases*, there are other railroads that are currently in reorganization proceedings, but these railroads are not affected by the employee protection provision of RITA." *Id.* at 470. Here, too, unlike the situation in the *3R Act Cases*, there is other newly discovered oil (outside Alaska), but that oil does *not* enjoy the special exemption accorded Alaskan oil.[20]

The Government finally seeks to invoke Justice Story in support of its "rational basis" theory. Gov. Br. 26-27. Justice Story wrote:

> "The answer to the * * * [uniformity requirement] may be given in a few words. It was to cut off all undue preferences of one state over another, in the regulation of subjects affecting their common interests. Unless duties, imposts and excises were uniform, the grossest and most oppressive inequalities vitally affecting the pursuits and employments of the people of different states might exist." J. Story, *Commentaries on the Constitution of the United States* Sec. 957, at 673 (2d ed. 1851).

Justice Story here was clearly seeking to *explain* the Uniformity Clause, not *construe* it. Without the Uniformity

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[20] The statute at issue in the *3R Act Cases* affected railroads in reorganization in the specified region during a 180-day period starting with the statute's effective date. 419 U.S. 102, 159-160 (1974). By the time of decision, the period had passed, establishing conclusively that there could never be any railroads outside the specified region to which the statute could have applied (but for its nominal geographic restriction).

Clause, he argued, "undue preferences" and "the grossest and most oppressive inequalities" might exist. In no way did he read the Clause as inviting the courts to review tax legislation for "oppression" or "undue" favoritism; he simply argued, as do appellees, that without the uniformity requirement the risk of such oppression is much increased. The Government, by contrast, confuses the purpose of the clause with the means adopted for achieving that purpose. By that sort of reasoning, one might equally conclude that, since the purpose of the requirement that a president be at least 35 years of age (Art. II, Sec. 1, cl. 5) is to assure adequate maturity, an exceptionally mature 30-year-old should be eligible. Brightline rules have their purposes, but that is hardly a reason to destroy their brightline character.

**2. There Is No "Majority Preference" Exception.**

At various points in the District Court the Government seemed to be urging a different proposed exception to the uniformity requirement. The Government argued there that the only "danger" sought to be averted by the Uniformity Clause was "a tax falling on a state or states imposed by a majority of other states." Brief for the Defendant in Support of Its Motion for Summary Judgment, at 10. Although no longer explicitly argued, the theory finds an echo in the Government's present brief. Thus, the Government argues that review under the Uniformity Clause should be "quite limited" when the tax provisions involve discrimination "against 49 states in favor of one." Gov. Br. 9, 39.

The theory is consistent with the Government's general effort to transform the Uniformity Clause into a diluted species of equal protection. However, the Government's argument founders at the outset on its own concession that the Uniformity Clause and the Port Preference Clause (Art. I, Sec. 9, cl. 6) are aimed at similar evils (Gov. Br. 23-27), for the Government now concedes that the Port Preference Clause was intended to prevent legislation "favoring"—as well as disfavoring—the ports of certain states (Gov. Br. 24).

Further, the alleged distinction between preference and prejudice is far more slippery than the Government suggests. In this very case, the Tax is—in fact—one imposed primarily upon a small minority of states that produces most domestic oil by the majority that produces little or none.[21] Alaska was a roadblock to enactment of the Tax, and the majority removed this roadblock by exempting oil from most of Alaska. See pp. 31-33, *infra*. The reality is very far from "discriminating against 49 states in favor of one." Gov. Br. 9, 39. If discrimination by a majority against a minority were a precondition to invoking the Clause, this Tax would still be invalid.

In any event, neither the Uniformity Clause nor the governing precedents distinguish between preferential non-uniformity and prejudicial uniformity. They do not permit non-uniformity where preference is involved, nor do they contemplate a lesser or "quite limited" measure of scrutiny in such a case. Compare Gov. Br. 9. Even if scrutiny were "quite limited," the Tax in this case is non-uniform by any geographic standard, so the Government's argument for "limited" review is meaningless, save as a backhanded way of arguing again for a rationality exception.

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For the Court now to jettison the established understanding would only invite Congressional testing of the new line. The Court would ultimately have to (1) render the Clause superfluous (by equating it with the "rational basis" test applied to all economic legislation under the Equal Protection Clause) or (2) embark on a process of case-by-case review of each new

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[21] There are 17 states with no oil production and another 27 with such trivial production that their shares aggregate a mere 15.3% of total American production (measured by wellhead value). The remaining 84.7% of production is concentrated in just six states (Texas, Louisiana, California, Oklahoma, Wyoming and Alaska). See Independent Petroleum Association of America, The Oil Producing Industry in Your State (1982 Edition), at p. 118.

geographically non-uniform tax to see whether it contained enough of the evils feared by the framers to justify invalidation—however those evils might be measured. Adherence to plain and long-established principle, however, will preserve the requirement's advantageous effects without in any way obstructing Congressional adoption of sound tax policy.

### C. Given the Requirement of Geographic Uniformity, the Tax Is Plainly Unconstitutional.

#### 1. Application of the Tax to One Fourth of Alaska Does Not Render the Tax "Uniform."

The Government appears to suggest that since the Tax falls upon some Alaskan oil, at high rates, it may, consistent with the Uniformity Clause, exempt the remaining three-fourths of Alaska. Gov. Br. 37-39. In fact, the existing Tax seeks to mitigate the impact on taxed Alaskan oil in several ways.[22] Even if it did not do so, the proper solution would be to revise the tax in permissible ways to take account of climate and transportation costs. The present lack of constitutional uniformity cannot be excused by arguing that the tax is also

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[22] In addition to reducing the Tax as transportation costs increase (see p. 13, n.16, *supra*), the statute contained a so-called TAPS adjustment (which was subsequently repealed by the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324, Sec. 284 (1982)) which provided a special benefit for Sadlerochit oil not available for oil produced in any other state. Normally, a decrease in transportation cost increased the wellhead price and therefore the tax owed. However, the TAPS adjustment provided that where the pipeline transportation cost in Alaska fell below a set figure, any further decrease would no longer increase the amount of tax owed for the Alaskan oil. The TAPS adjustment was another example of non-uniformity which favored Alaska. The Senate Finance Committee, in 1982, recognized that the "TAPS adjustment provid[ed] producers of Sadlerochit oil a benefit given to no other oil producers," and recommended repeal of the TAPS adjustment. S. Rep. No. 97-494, 97th Cong., 1st Sess. 346 (1982).

unreasonably burdensome in some other respect. *See Minneapolis Star & Tribune Co.* v. *Minnesota Commissioner of Revenue*, No. 81-1839, slip op. at 11-12, 17 (U.S., March 29, 1983).

The sole support adduced in support of the Government's interpretation comes in the form of decisions construing another provision of the Constitution, the Port Preference Clause:

> "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another; nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another." Art. I, Sec. 9, cl. 6.

Not one of this Court's discussions of the Uniformity Clause hints in the slightest way at any idea that partial non-uniformity is valid, that violation occurs only if 100 percent of some state is treated differently from its fellows. Instead, the cases show that full geographic uniformity is required. The *Head Money Cases*, 112 U.S. 580, 594 (1884) (uniform tax must operate "with the same force and effect in *every place* where the subject of it is found"); *Knowlton* v. *Moore*, 178 U.S. 41, 84 (1900) ("wherever a subject is taxed anywhere, the same must be taxed everwhere throughout the United States, and at the same rate"); *Florida* v. *Mellon*, 273 U.S. 12, 17 (1927) ("the rule of liability shall be the same *in all parts* of the United States") (emphasis supplied in all above quotes).

In contrast with this understanding of the Uniformity Clause, the prohibition against port preferences has always been understood to allow Congress to provide for the improvement of particular navigational facilities, such as rivers and harbors, lighthouses, and bridges. The first two Congresses alone, for instance, provided in four separate enactments for individual port improvements.[23] In light of the early origins and

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[23] *E.g.*, 1 Stat. 53-54 (Act of August 7, 1789); 1 Stat. 246 (Act of April 2, 1792); 1 Stat. 251 (Act of April 12, 1792, authorizing beacons at Charleston, S.C. and other sites); 1 Stat. 251 (Act of April 12, 1792, authorizing lighthouse at Montauk Point).

constant recurrence of this practice[24] it is hardly surprising that in *Pennsylvania* v. *Wheeling and Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855), the Court found no Constitutional violation in a similar Congressional approval of a specific bridge.[25] However, the Court has stated that under the Port Preference Clause "positive" commercial regulation must be "common and equal in all the ports of the several States." *Id.* at 435.

Until this lawsuit, no one interpreting the Uniformity Clause ever suggested that its structure could be evaded merely by treating some modest fraction of a favored state the same as the others. Congressional practice has for 200 years been in full conformity with the oft-stated meaning of the Uniformity Clause. The Government suggests no basis in precedent or policy under that Clause for the abandonment of this universal understanding.

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[24] This Court has typically deferred in constitutional interpretation to constructions by Congress contemporaneous with the adoption of the Constitution. See, *e.g.*, *Cooley* v. *Board of Wardens*, 53 U.S. (12 How.) 299, 315 (1851); *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 351-52 (1816).

[25] In *Commission* v. *Texas & N.O.R. Co.*, 284 U.S. 125 (1931), also cited by the Government, the Interstate Commerce Commission had set rates that provided for a charge of eight cents per ton for ferrying such of the traffic as crossed the Mississippi. The Court rejected an attack on these rates, based on the Port Preference Clause, merely because they might "incidentally result to the disadvantage" of ports in one state compared to those of another, *id.* at 131. If ICC rates were invalid merely because they reflected the natural geographic disadvantage of Louisiana ports compared to ones not separated from the market by a wide river, a vast deal of legitimate ratemaking would fail. Moreover, the framers recognized from the outset that the Port Preference Clause allowed Congress to designate particular ports as ports of entry without so designating all comparable ports. See 1 Elliot's Debates 375-76. No similar latitude has ever (until now) been suggested with respect to taxes governed by the Uniformity Clause. Compare *id.* at 369.

### 2. The Alaska Exemption Was Effective During the Periods for Which Refunds Are Claimed, and the Act Violated the Uniformity Clause Throughout That Period.

The Government repeatedly asserts that during the periods for which refund claims were made (March 1 through December 1, 1980), the tax operated with "absolute geographic uniformity." Gov. Br. at 40, 41, 42. Based on this incorrect characterization, the Government asks this Court to draw the incorrect conclusion that the tax was uniform during the period over which the district court had jurisdiction.[26]

The Government attempts to analogize the Alaskan exemption to an exemption for oil produced in Hawaii (where it asserts oil has never been found) and argues that taxes subject to such exemptions are uniform until exempt oil has actually been produced. Thus the Government ties itself to the odd view that on December 13, 1981, the Act could be constitutional but could become unconstitutional on December 14, 1981, when exempt oil was first produced. See Kye Trout Affidavit. J.A. 52-53. If exempt Alaskan wells ceased operation for a week, the Tax on this theory would abruptly become lawful for that period.

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[26] After having moved the Court to expedite this case, the Government incongruously suggests that the case is not ripe. However, because oil production in the exempt areas of Alaska was imminent during the periods for which appellees sought refunds and in fact began well before the district court's decision, this case does not represent the sort of abstract disagreement that the ripeness requirement was designed to remove from judicial consideration. See *3R Act Cases*, 419 U.S. 102, 139-40 (1974). By the time of adjudication the tax had been imposed and the exemption had been enforced. The effect of the challenged statute ha[d] been "felt in a concrete way." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148 (1967). Nothing in the case would have become or will now become more clear-cut by postponing resolution of the uniformity issue. See *3R Act Cases*, 419 U.S. at 143; *City Bank Co.* v. *Schnader*, 291 U.S. 24, 34 (1934).

Apart from its premise that the constitutionality of a tax may vary from day to day, the Government's theory ignores the effects of the Alaska exemption in the real world throughout the period for which refunds are sought. During this period, appellees paid onerous taxes pursuant to a statute that on its face unconstitutionally distinguished between their oil production and any that might take place in the exempt areas. Legally, producers in exempt areas were entitled to the benefit of the exemption from the day the Act was effective; they were free to act with the assurance that any oil produced by them in the exempt area would be free of tax. Consequently, the Act's non-uniformity had immediate consequences: it increased the value of the investments of appellees' competitors who held interests in the exempt areas and encouraged further investment in production in those areas.[27] By increasing the anticipated return on investment in the exempt area relative to investments elsewhere, the Tax gave companies investing in the exempt area an immediate competitive advantage in the quest for capital. If more in the way of practical effect were required,[28] cases resolved on the basis of imminent constitutional injury could never support a declaration of *present* unconstitutionality. But such cases, of course, are not uncommon.[29]

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[27] Atlantic Richfield Company invested almost $700 million in developing the Kaparuk River field and acquired new interests in the exempt areas at a cost of some $36 million. The company states that since the enactment of the Windfall Profit Tax it "has conducted extensive exploration activities" and "has increased the scope of its . . . investments and accelerated their timing in reliance on the 'Alaskan oil' exception." Brief of *Amicus Curiae*, Atlantic Richfield Company, at 2.

[28] The *3R Act Cases*, 419 U.S. 102 (1974), do not suggest that more is required. Given the terms of the statute and the facts existing at the time it became effective, the 3R Act could *never* operate non-uniformly. See p. 18 n.20, *supra*.

[29] See, *e.g.*, *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 600 (1923); *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 288, 310, 311 (1936); *Pierce* v. *Society of Sisters*, 268 U.S. 510, 535-36 (1925). See also

*(footnote continues)*

If, as the Government whimsically suggests, the exemption were for oil produced in Hawaii, the same reasoning would apply. Realistically the reason for enacting such an exemption would be to encourage oil exploration in a previously unproductive area, and the exemption would affect the incentives and planning of oil producers. Alternatively, if it is assumed that no barrel of oil could ever be produced in Hawaii during the taxing period, the exemption might be viewed as ineffective surplusage, like the geographic terms in the *3R Act Cases*. But this only serves to emphasize how different is the exemption involved in this case. The Alaskan exemption was defined to include areas known at the time to have vast oil reserves and was so defined specifically to encourage investment and production in those areas. Its presence rendered the Tax invalid from the moment of enactment.[30]

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*(footnote continued)*

*Sully* v. *American National Bank*, 178 U.S. 289, 300 (1900) (claim of unconstitutional discrimination between resident and nonresident creditors does not depend on whether any resident creditors were actually favored by operation of statute).

[30] The Government hints at an argument that if the "subject" of the Tax is the enjoyment of a "windfall profit" by the owner of an economic interest in oil, wherever those owners may be located, there is no geographic nonuniformity violative of the Constitution (Gov. Br. 28). The Government's implicit argument, if accepted, would completely eliminate the uniformity requirement. Assuming, for example, that some owners of Florida orange groves are domiciled elsewhere, Congress would be free to levy an excise tax on production of Florida oranges, exempting orange production in every other state.

## II. THE WINDFALL PROFIT TAX, NOT THE EXEMPTION, IS UNCONSTITUTIONAL, AND JUDICIAL EXTENSION OF THE TAX TO ALASKA IS AN IMPROVIDENT AND IMPERMISSIBLE REMEDY.

### A. The Alaska Exemption Was of Central Concern to Congress and Was Essential to Passage of the Tax; Extension of the Tax to Alaska Would Clearly Frustrate Congressional Intent.

#### 1. Congress Regarded the Alaska Exemption As an Essential Part of the Balance It Sought to Achieve.

The District Court concluded that it was "clear that the Alaska exemption was the result of negotiations and compromise, and that the Act as it exists today would not have been passed without the invalid Alaska provision." J.S., App. A, 9a. In light of that finding as to Congressional intent, it refused the Government's invitation to extend the Tax to Alaska and instead invalidated the Tax. The District Court's reading of the Congressional intent was clearly correct. Judicial extension of the Tax to the exempt portions of Alaska would run counter to Congress's explicit, resolute decision in favor of exemption.

The general principle governing "separability" is not controversial: Congressional intent controls. Extension of the Tax to the exempt portions of Alaska is not appropriate if "it is evident that the legislature would not have enacted the legislation without the invalid portion."[31] Where Congress has not ex-

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[31] *Zobel* v. *Williams*, 102 S. Ct. 2309, 2315 (1982), citing *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976); *United States* v. *Jackson*, 390 U.S. 570, 585 (1968); *Champlin Rfg. Co.* v. *Commission*, 286 U.S. 210, 234 (1932). There is nothing outmoded about this analysis, as the Government implies. Gov. Br. 48. The rule referred to in *Griffin* v. *Breckenridge*, 403 U.S. 88, 104 (1971), as being one that this Court had "long since firmly rejected" (Gov. Br. 48-49), was in fact a rule wholly irrelevant to the present case, namely, the rule that a party challenging the unconstitutionality of a statute could prevail merely by showing that some *other* application of it that was unconstitutional. See *Griffin* v. *Breckenridge*, *supra*, at 104, and *United States* v. *Raines*, 362 U.S. 17, 20-24 (1960), relied on by the Court in *Griffin*.

pressed itself directly on the matter, Congressional intent can be inferred primarily from evidence as to the importance Congress attached to the invalid provision. Where the portion "is of such import that the other sections without it would cause results not contemplated or desired by the legislature, then the entire statute must be held inoperative." *Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540, 565 (1902).[32]

The Alaska exemption was by every possible measure an integral, critical aspect of the Tax. Every seriously considered bill reflected the President's and Congress's determination to exempt vast quantities of Alaskan oil production. President Carter's proposals to Congress called for complete exemption of all North Slope oil and any other oil transported through the Trans-Alaska Pipeline System.[33] The House Ways and Means Committee bill taxed newly discovered oil but exempted Alaskan oil produced north of the Arctic Circle (except for the Sadlerochit reserves already in production), and the Senate Finance Committee bill exempted all newly discovered oil,[34] thereby sheltering from the Tax all the oil that benefits from the Alaska exemption under the Tax ultimately adopted. The final Senate bill, like its House counterpart, taxed newly discovered oil but exempted Alaskan oil from North of the Arctic Circle (other than Sadlerochit oil).[35] Finally, the bill reported out of conference retained the exemption provided for by House and Senate, but expanded it to include oil produced south of the Arctic Circle but north of the divides of the Alaska

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[32] *Tigner* v. *Texas*, 310 U.S. 141 (1940), overruled *Connolly* on the underlying Constitutional issue but not on the analysis of separability.

[33] H. Doc. 96-107, 96th Cong., 1st Sess., *Windfall Profits Tax and Energy Security Trust Fund: Message from the President of the United States* 3 (1979).

[34] H. Rep. No. 304, 96th Cong., 1st Sess. 30 (1979); S. Rep. No. 394, 96th Cong., 1st Sess. 42-43 (1979).

[35] See 125 Cong. Rec. S18564-67 (daily ed. December 14, 1979); H. Rep. No. 96-817, 96th Cong., 2d Sess. 102 (1980).

and Aleutian Ranges and more than 75 miles from the TAPS system. This uninterrupted adherence to the Alaskan exemption is clear evidence of its importance to Congress.[36]

The Alaska exemption also played a key role in reconciling conflicting Congressional objectives. While one Congressional goal was to generate tax revenues and to finance energy conservation and low-income energy assistance, another was to encourage domestic energy production and reduce dependence upon imported oil. The legislative history is replete with references to the balance struck in the Act among these competing goals.[37] The Alaskan exemption was seen by Congress as being an integral part of that balance. The House Report on an earlier version of the bill explained:

> "To provide the appropriate production incentives, the bill provides special treatment for newly discovered oil, certain Alaskan oil, and incremental oil production from qualified tertiary recovery projects . . . .
>
> [A] relatively heavy tax on tier one and tier two oil, along with the *more lenient treatment of* newly discovered, *Alaskan* and tertiary *oil, strikes the appropriate balance between revenue needs and production incentives.*" H.R. Rep. No. 304, 96th Cong., 1st Sess. 14 (1979) (emphasis added).[38]

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[36] Compare *Consumers Energy Council* v. *Federal Energy Regulatory Commission*, 673 F.2d 425, 440-45 (D.C. Cir. 1982) (fact that the legislative veto of Title II of the Natural Gas Policy Act was added only in conference, and not even mentioned in the conference report, deemed powerful evidence that Congress would have intended it to be severed).

[37] See, *e.g.*, 126 Cong. Rec. H1834 (daily ed. Mar. 13, 1980) (remarks of Rep. Ullman); 126 Cong. Rec. S2630 (daily ed. Mar. 19, 1980) (remarks of Sen. Gravel); 126 Cong. Rec. S2855 (daily ed. Mar. 24, 1980) (remarks of Sen. Baucus).

[38] The Senate Report also emphasized that "in designing the tax, the committee attempted to reduce or eliminate the tax burden on those types of oil the production of which is likely to be relatively sensitive to changes in tax rates or prices." S. Rep. No. 394, 96th

*(footnote continues)*

The Joint Explanatory Statement of the Conference Committee reflects the same concern:

> "The exemption of Alaskan oil production for the designated locations reflects the concern of the conferees that taxation of this production would discourage exploration and development of reservoirs in areas of extreme climatic conditions." H. Rep. No. 817, 96th Cong., 2d Sess. 103 (1980).

The debate in both Houses echoed the same concerns. It was pointed out that Alaska supplied approximately 15 percent of domestic oil currently being produced (roughly 1 out of 6 barrels produced domestically) and about 800 million barrels of known reserves still remained in the west (exempt) end of the Sadlerochit Reservoir.[39] In addition to known reserves in Prudhoe Bay, Senate discussions noted the discovered but as yet unproven reserves in the Kuparuk and Lisburne fields. 125 Cong. Rec. S17715 (daily ed. Dec. 4, 1979) (remarks of Sen. Bradley). In general, Congress believed that there was a tremendous amount of oil yet to be produced in Alaska and that this oil should be exempt from the Tax.[40]

The Government concedes the importance of price in generating exploration for the production of Alaskan oil. It

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*(footnote continued)*

Cong., 1st Sess. 2 (1979). The Committee went on to explain that its exemptions, including newly discovered oil (which encompassed all the oil that benefits from the Alaska exemption under the Tax as adopted), were intended to "encourage greater oil production." *Id.*

[39] 126 Cong. Rec. H1842-43 (daily ed. Mar. 13, 1980) (remarks of Rep. Young); 125 Cong. Rec. S17666 (daily ed. Dec. 3, 1979) (remarks of Sen. Stevens). Current United States government estimates of the reserves in the exempt portions of the Sadlerochit Reservoir (*i.e.*, the portion of that reservoir outside Prudhoe Bay) now greatly exceed the figure used by Senator Stevens. See p. 3 n.4, *supra*.

[40] See 125 Cong. Rec. S18137 (daily ed. Dec. 10, 1979) (remarks of Sen. Long); 126 Cong. Rec. S2772 (daily ed. Mar. 20, 1980) (remarks of Sen. Bellmon).

correctly notes that "a relatively small reduction in the price of oil during 1982 led to a slowdown in development in the Kuparuk River field." Gov. Br. 19-20 n.26. An increase in tax, reducing the after-tax return, would have an identical impact. Clearly, therefore, Congress would not have been satisfied with a Windfall Profit Tax unchanged except for deletion of the Alaska exemption. This was recognized even by Senator Long, then but not now (see p. 5, *supra*) a major supporter of the Tax. In a caveat that the Government relegates to a footnote (Gov. Br. 46 n.41), he admitted that absent the Alaskan exemption, some other relief for high cost oil would have to be devised. See p. 34, *infra*.

The Senate decision to exempt Alaskan oil came as part of a unified package, the other part of which was extension of the Tax to newly discovered oil in 49 states. See 125 Cong. Rec. S18564-67 (daily ed. Dec. 14, 1979) and text *infra*. Adoption of the package played a vital role in resolution of a stalemate that had developed between those who sought to extend the Tax and those opposed either to the Tax as a whole or to its extension to new oil. The package arrangement constituted the essential compromise that ended the stalemate and paved the way for adoption of the Tax.

Debate on the Tax bill had begun on November 15, 1979, but, starting as early as December 3, 1979, the official record of the Senate debate contains allusions to intensive behind-the-scenes negotiations between the contending forces.[41] To maintain the pressure on the negotiators, the Majority Leader, Senator Byrd of West Virginia, frequently kept the Senate in session into the evening. Allusions of threatened or actual delaying actions were frequent, as was evidence of such action.[42] Senator Long indicated that the committed resistance

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[41] See, *e.g.*, 125 Cong. Rec. at S17688 (daily ed. Dec. 3, 1979) (remarks of Sen. Byrd); S17707 (daily ed. Dec. 4, 1979) (remarks of Sen. Byrd) and S18509 (daily ed. Dec. 14, 1979) (remarks of Sen. Boschwitz).

[42] See, *e.g.*, 125 Cong. Rec. at S17707 (daily ed. Dec. 4, 1979) (Sen. Stevens, indicating readiness to withhold otherwise appropriate

*(footnote continues)*

of a single Senator might jeopardize passage of *any* bill. 125 Cong. Rec. S18041 (daily ed. Dec. 7, 1979). Cloture votes were threatened, then delayed.[43] Finally, on December 14, 1979, the logjam broke. The major participants in the behind-the-scenes negotiations arrived at a compromise, pursuant to which the Senate extended the Tax to "newly discovered oil (other than newly discovered oil produced north of the Arctic Circle)."[44]

Throughout the extensive negotiations Senator Stevens of Alaska, the Acting Minority Leader, played a significant role.[45] In expressing his reluctant approval of the compromise measure, he stated his flat opposition to any further amendment that would increase the tax on Alaskan oil. 125 Cong. Rec. S18565 (daily ed. Dec. 14, 1979). The timing, the key role of

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*(footnote continued)*
unanimous consents); S17707-08 (daily ed. Dec. 4, 1979) (Sen. Byrd, asserting desire to avoid filibuster); S17805 (daily ed. Dec. 5, 1979) (Sen. Dole, threatening a "long debate" if proposed amendment restricting percentage depletion were passed); S18039-42 and S18050-51 (daily ed. Dec. 7, 1979) (allusions by Senators Byrd, Long and Dole to the problem of non-germane amendments); S17932, S18136 (daily eds. Dec. 6, 1979, Dec. 10, 1979) (tabling or defeat of such amendments).

[43] See 125 Cong. Rec. S18039-42, S18052 (daily ed. Dec. 7, 1979) (remarks of Senators Byrd, Long, and Dole). Those seeking to limit the drastic nature of the proposed tax bill expressly suggested that their cooperation on the Chrysler bail-out was to some extent conditional on their receiving some cooperation on the Windfall Profit Tax. See 125 Cong. Rec. S18040-41 (daily ed. Dec. 7, 1979) (remarks of Sen. Tower).

[44] See 125 Cong. Rec. S18564 (daily ed. Dec. 14, 1979) (Amendment No. 877 as modified), adopted at S18567 (Dec. 14, 1979). The compromise came only after six prior compromise proposals had collapsed. "This compromise that has been worked out looked like it was about to fall apart six times, and it did fall apart. It has been put together a seventh time, however . . . ." 125 Cong. Rec. S18570 (daily ed. Dec. 14, 1979) (remarks of Senator Percy).

[45] See 125 Cong. Rec. S18564, S18565 (daily ed. Dec. 14, 1979) (expressions of appreciation by Senators Dole and Nelson to Senator Stevens for his work on the compromise).

Senator Stevens, and Senator Stevens's unequivocal position opposing taxation of newly discovered Alaskan oil, all indicate that without the Alaska exemption the Tax would not have passed in its present form.[46]

The Alaska exemption was thus an integral part of the compromises necessary to secure final passage of the Act. The compromise package was, in essence, a unified decision to tax newly discovered oil in 49 states. Clearly it would not be consistent with Congressional intent for this Court to remove half the package (the Alaskan exemption) and to leave the other half (the inclusion of newly discovered oil). Such a revision would effectively "mutilate" the work of Congress. See *Williams* v. *Standard Oil Co.*, 278 U.S. 235, 242 (1929).

**2. Senator Long's Isolated Remark Does Not Overcome the Clear Evidence of Congressional Insistence Upon the Alaska Exemption.**

The Government lays great stress on selected portions of an observation by Senator Long on the Senate floor Gov. Br. 45-46. Senator Long at one point declared that if the courts should find that the Alaskan exemption violates the Uniformity Clause of the Constitution, "that provision should be regarded as a nullity and . . . Alaska will pay the same 30-percent tax on new oil as everybody else." 126 Cong. Rec. S3056 (daily ed. Mar. 26, 1980). But this observation is overwhelmed by the legislative history as a whole and was crucially qualified by Senator Long himself.

Whatever Senator Long's intent, the intent of Congress as a whole is quite a different matter. "[O]rdinarily even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history." *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102,

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[46] The Government suggests that, as no member of the Alaska delegation to Congress voted for the final bill, the exemption cannot have derived from a trade with that delegation. Gov. Br. 46-47 n.42. This misses the nature of the trade: Alaska exemption in exchange for release of the bill from the stalemate.

118 (1980). There was neither discussion nor vote on the issue of separability, and no separability clause was inserted in this Act. No thought similar to Senator Long's was expressed by any other Senator or in the House of Representatives. No Senator reacted in any way to Senator Long's observations. No committee report referred directly to separability; rather, the reports stress the exemption's importance and thus suggest its nonseparability.[47]

Moreover, Senator Long himself acknowledged that Congress would not be satisfied with the Act without the exemption. He said that if the tax were applied to the now exempt areas of Alaska, "we would expect to act in the future to remedy this and to try to provide some consideration based on the cost of transportation and the high cost of developing oil and producing oil in those areas north of the Arctic Circle, and those areas that are far removed from a pipeline or any kind of a feasible water transportation." 126 Cong. Rec. S3056 (daily ed. Mar. 26, 1980). In other words, even for Senator Long the Tax without the Alaska exemption could not stand in the form adopted. Taken as a whole, his statement reflects his recognition that the *specific circumstances* justifying a judicial decision to sever were absent in this instance: namely, confidence that Congress would be satisfied with the Tax *without* the exemption.[48]

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[47] This Court has emphatically recognized the "more authoritative" character of committee reports, see *United States* v. *O'Brien*, 391 U.S. 367, 385 (1968); *Zuber* v. *Allen*, 396 U.S. 168, 186 (1969). Here the committee reports say nothing to support a belief that Congress would have accepted the bill without the exemption, and, in their stress on the importance of the exemption (see pp. 29-30, *supra*) give every possible support to the opposite view.

[48] Indeed, perhaps because of that recognition, Senator Long has since publicly expressed his view that the entire Tax should be invalidated. See News Release from the office of Senator Russell B. Long, November 5, 1982, quoted p. 5, *supra*.

### B. The Precedents and Sound Policy Require Invalidation of the Tax Rather Than Its Extension to Transactions Expressly Exempted by Congress.

When a tax statute (or tax enforcement practice) is illegal simply because the legislature (or enforcing agency) has drawn a distinction that it is not legally entitled to draw, this Court's holdings on the matter have uniformly and unequivocally rejected the remedy of extending the tax. The leading case is *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239 (1931), where the Court held as a substantive matter that state tax enforcement authorities had violated the Equal Protection Clause by taxing the shares of state banks more leniently than those of a similar national bank. The discrepancy arose because the county auditor had in violation of state law adjusted the treatment of state banks in their favor. *Id.* at 242. The Court rejected the proposed remedy of ordering those authorities to collect additional taxes from state banks. Writing for the Court, Justice Brandeis stated:

> "The right invoked is that to equal treatment; and such treatment will be attained if either their competitors' taxes are increased or their own reduced. But it is well settled that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law, cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid." 284 U.S. at 247.

Justice Brandeis cited an array of cases as "settling" the matter.[49] The same principle governs in this case.[50]

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[49] *Cumberland Coal Co.* v. *Board of Revision*, 284 U.S. 23 (1931); *Greene* v. *Louisville & Interurban Ry.*, 244 U.S. 499, 514-519 (1917); *Chicago Great Western Ry.* v. *Kendall*, 266 U.S. 94, 98 (1924); *Sioux City Bridge Co.* v. *Dakota County*, 260 U.S. 441, 445-47 (1923).

[50] The Government seeks to distinguish *Iowa-Des Moines National Bank* on the ground that the illegal distinction was not statutory in origin and that "separability" as such was not at issue. Gov. Br. 49-50 n.45. But the "separability" issue is simply a phrase addressing the problem of remedy for an illegal statute. In fact, the reasons for judicial refusal to extend the tax are even *more* cogent when an invalid statute is involved. See pp. 41-44 below.

More recently, *Moritz* v. *Commissioner of Internal Revenue*, 469 F.2d 466 (10th Cir. 1972), constitutes an application of the *Iowa-Des Moines National Bank* principle where the illegal differentiation occurred in a Congressional statute. Finding that Congress's provisions for eligibility for a specific deduction violated the equal protection concept implicit in the Due Process Clause of the Fifth Amendment, the Court cured the illegality by expanding the terms of eligibility to include the challenging taxpayer. *Moritz* is especially significant because it also involved the general severability provision relied on by the Government in this case. See p. 40, *infra*.

These decisions in the tax area represent a more general pattern: that of refusing to apply remedies that would chill the readiness of potential plaintiffs to litigate unconstitutional statutes or actions. Prospective plaintiffs, receiving little or no benefit from such a challenge, would lose the incentive to make it. As a consequence, such invalid statutes would remain in force. Thus, in a particular case severance might seem to reconcile the statute to the Constitution, but use of the doctrine in cases of unequal treatment would, in the end, disserve the Constitution.

The issue arises wherever government has drawn an unlawful distinction either in imposing a burden or conferring a benefit. The tax cases, obviously, represent an instance of the former. But the problem has arisen in many other contexts. In *Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540 (1902), the Court held that an Illinois statute penalizing combinations in restraint of trade was illegal because of its exception for agriculturalists or live stock dealers.[51] The Court refused to cure the statute by extending its coverage to such exempted persons, saying that otherwise those persons should be penalized when it was clearly the legislature's intent that they not be.[52]

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[51] *Tigner* v. *Texas*, 310 U.S. 141 (1940), overruled *Connolly* on that point, but not on the severability issue.

[52] Similar refusals to extend the burden occur in *Welsh* v. *United States*, 398 U.S. 333, 361-67 (1970) (Harlan, J., concurring) (extending draft exemption, *i.e.*, cutting back the scope of the burden en-

*(footnote continues)*

In a vast range of cases involving social insurance benefit programs, courts have similarly cured unconstitutional provisions for eligibility by extending benefits to the plaintiff excluded by the granting statute. The alternative remedy—contracting the benefit program—would have had the effect of signaling to plaintiffs that they had nothing to gain by challenging the legislative criteria.[53] Thus, in a wide variety of situations, courts have been alert to the necessity of structuring relief so that at least some persons adversely affected by an unconstitutional classification will have an incentive to bring the violation to the attention of the courts.

The Government lays great stress upon the dictum of Justice Sutherland in *Utah Power & Light Co.* v. *Pfost*, 286 U.S. 165 (1932). Gov. Br. 49. In addition to being dictum, the language is of little relevance, since the Court there found that "[t]he primary object of the statute, under review, plainly, is to raise revenue. The exemption . . . and the provisions for carrying that exemption into effect are secondary." *Id.* at 185. Although Congress obviously enacted the Windfall Profit Tax to raise

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tailed by the draft); *Skinner* v. *Oklahoma*, 316 U.S. 535, 542-43 (1942) (striking statutes providing for sterilization of certain habitual criminals rather than curing it by extending its burden to embezzlers); *Marchetti* v. *United States*, 390 U.S. 39, 59-60 (1968) (upholding defendants' assertion of their Fifth Amendment privilege against self-incrimination, as a defense against prosecution under federal wagering tax statutes, rather than merely imposing restrictions on use of information obtained by compliance with the statutes).

[53] *Frontiero* v. *Richardson*, 411 U.S. 677, 691 n.25 (1973) (service benefits); *Califano* v. *Westcott*, 443 U.S. 76, 89-93 (1979) (welfare benefits); *United States Department of Agriculture* v. *Moreno*, 413 U.S. 528 (1973) (welfare benefits); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969) (welfare benefits); *Vaccarella* v. *Fusari*, 365 F. Supp. 1164, 1170 (D. Conn. 1973) (unemployment compensation); *Bowen* v. *Hackett*, 361 F. Supp. 854, 862 (D.R.I. 1973) (unemployment compensation); *Robison* v. *Johnson*, 352 F. Supp. 848 (D. Mass. 1973) (veterans' educational benefits); *Jablon* v. *Secretary of Health, Education and Welfare*, 399 F. Supp. 118 (D. Md. 1975), *aff'd*, 430 U.S. 924 (1977) (social security benefits).

revenue, it crafted the Tax with intense concern lest it unduly discourage domestic oil production and thereby increase dependence on foreign energy supplies. See pp. 28-31, *supra*. Nothing in *Utah Power & Light Co.* suggests that any parallel concern animated the Idaho legislature's structure of the tax there at issue. There is nothing "secondary" about the Alaska exemption; the Windfall Profit Tax would not have arisen without it.

Moreover, in the era of that decision, state legislatures typically sat for only a brief period every two years. Until its amendment in 1968, for example, Article 3, § 8 of the Idaho Constitution provided for biennial sessions. See 1 Idaho Code Ann. 132 (1980). Judicial invalidation of a tax under such circumstances might leave a state without a critical source of revenue for an extended time. By contrast, Congress is currently in session almost without interruption and can readily enact substitute legislation.

After the decision in *Utah Power & Light Co.*, this Court not only reaffirmed Justice Brandeis's holding in *Iowa-Des Moines National Bank* v. *Bennett*, *supra*, but stressed the importance of its remedial principle:

> "The constitutional requirement [of non-discriminatory treatment], however, is not satisfied if a State does not itself remove the discrimination, but imposes upon him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class." *Township of Hillsborough* v. *Cromwell*, 326 U.S. 620, 623 (1946).[54]

Clearly, then, the *Utah Power & Light Co.* dictum has in no way undermined the proposition, said by Justice Brandeis to be "settled," "that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law, cannot be required himself to assume the bur-

[54] In support of the decision, the Court cited *Iowa-Des Moines National Bank* and two of the cases relied upon therein by Justice Brandeis. *Hillsborough* held that the remedies provided by the state were inadequate and that federal jurisdiction would lie.

den of seeking an increase of the taxes which the others should have paid." *Iowa-Des Moines National Bank* v. *Bennett*, *supra*, 284 U.S. at 247. That principle is fully applicable to the present case, and calls for invalidation of the Tax as a whole.

### C. Section 7852(a), the Internal Revenue Code's General Separability Provision, Provides No Basis for Judicial Extension of the Windfall Profit Tax to Alaska.

Lacking a separability provision in the Tax itself, the Government relies on the general separability clause designed to save the Internal Revenue Code as a whole. 26 U.S.C. § 7852(a) provides:

> "If any provision of this title, or the application thereof to any person or circumstance, is held invalid, the remainder of the title, and the application of such provision to other persons or circumstances, shall not be affected thereby."

On its face, this provision invalidates the Tax and not the Alaska exemption. Section 7852(a) is manifestly intended to save the Internal Revenue Code as a whole (the "title" referred to in Section 7852(a)) by authorizing the courts to sever and delete provisions or applications that unlawfully *tax* certain persons or circumstances. In the instant case the "invalid provision" (within the meaning of that section) is the *Windfall Profit Tax by reason of its nonuniformity*. There is nothing invalid about a congressional decision not to tax Alaska oil; what is invalid is the imposition of a tax on oil in only 49 states. The straightforward application of Section 7852(a), therefore, is to invalidate the Windfall Profit Tax, not the exemption.[55]

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[55] Compare *Minneapolis Star Tribune Co.* v. *Minnesota Commissioner of Revenue*, No. 81-1839, White, J., *Concurring and Dissenting*, slip op. at 1 (U.S. March 29, 1983). The Government repeatedly seeks to blur this central distinction by describing the Alaska exemption as if it were itself unconstitutional, something that appellants have never asserted. Thus, the Government brief—in the very caption of its separability argument—asserts that "even if the Alaska oil exemption violates the uniformity clause," separability is appropriate. Gov. Br. 43. It repeatedly implies that at worst, it is the exemption that is "bad" (*id.* at 43) or "the unconstitutional portion" (*id.* at 44) or "the invalid portion" (*id.* at 44, 46, 48) or "barred." *Id.* at 50.

Section 7852(a) has once been considered in the context of a tax provision that illegally differentiated between taxpayers; its application by the Court was exactly congruent with appellees' contention here. In *Moritz* v. *Commissioner of Internal Revenue*, 469 F.2d 466 (10th Cir. 1972), the court considered Section 214(a) of the Code, which allowed a wide variety of persons to take a particular deduction, but denied it to a man who had never been married. In a suit by an ineligible taxpayer, the Court held the restrictive classification invalid under equal protection principles. By way of relief, it granted eligibility to the plaintiff taxpayer rather than striking down the deduction. Thus the Court *restricted* the application of the income tax. The parallel solution in our case is to extend the benefit of the exemption afforded Alaska—to strike down the Windfall Profit Tax.[56]

Alternatively, even if the Alaska exemption could be conceived of as an "invalid provision" within the meaning and purposes of Section 7852(a), the clause would not require the Court to sever the Alaska exemption rather than invalidate the Tax. The cases, cited in the margin, confirm that a separability clause is an aid in determining legislative intent, not an inexorable command.[57] In *Williams*, this Court made clear that a separability provision does no more than reverse the normal presumption that an act should stand or fall as a whole. Invalidation of the enactment as a whole remains proper when the court finds a "clear probability that the invalid part being eliminated the legislature would not have been satisfied with what remains." 278 U.S. at 242. Similarly in *Railroad Retirement Board* v. *Alton Railroad Co.*, 295 U.S. 330 (1935), this Court declared:

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[56] This treatment of Section 7852(a) is consistent with *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239 (1931), discussed p. 35, *supra*.

[57] *Railroad Retirement Board* v. *Alton Railroad Co.*, 295 U.S. 330 (1935); *Williams* v. *Standard Oil Co. of Louisiana*, 278 U.S. 235 (1929); *Dorchy* v. *Kansas*, 264 U.S. 286 (1924).

"[N]otwithstanding the presumption in favor of divisibility which arises from the legislative declaration, we cannot rewrite a statute and give it an effect altogether different from that sought by the measure viewed as a whole." 295 U.S. at 362.[58]

Thus, even if the literal terms of Section 7852(a) applied to the Alaska exemption, the necessary inquiry into legislative purposes would remain. That history shows not just the "clear probability" but the certainty that Congress would not have adopted the Tax in its present form without the Alaskan exemption. Extension of the Tax to Alaska would thwart a critical intention of Congress—that the Windfall Profit Tax not operate unduly to discourage development of Alaska's vast oil resources.

**D. Congress Is Best Able to Resolve the Sensitive and Difficult Policy Issues that Are Involved in Remedying the Invalid Tax.**

Any cure of the Windfall Profit Tax will have a dramatic impact upon taxpayers and on the prospects for domestic energy independence. The policy values at stake require Congressional action—not only because of Congress's capacity to make essentially legislative trade-offs between such values but also because of its ability to adjust all the provisions of the Tax that are necessarily affected.

First, extension of the Windfall Profit Tax to Alaska would unfairly affect taxpayers who, in reliance on the exemption from the Tax, have since enactment of the Tax invested hundreds of millions in the exploration and development of Alaskan properties. Atlantic Richfield alone has invested $700 million in the development of the Kuparuk River field and at least another $36 million in acquisition of leaseholds in exempt areas above and below the Arctic Circle (see Brief *Amicus Curiae* of

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[58] Moreover, where the separability clause relied on is a general separability clause in a preexisting statute, its aid in determining legislative intent is very much weakened. 2 *Sutherland, Statutory Construction* § 44.11, at 356 (4th ed. C. Sands 1973).

Atlantic Richfield Company at 2). Indeed, the element of unfair surprise in such a retroactive tax itself raises serious Constitutional problems, even if it were done by Congress. See *Nichols* v. *Coolidge*, 274 U.S. 531, 542-43 (1927).

Second, imposition of the Tax on Alaska would also materially increase the nation's dependence on imported oil, and the risks inherent in such dependence. The Government notes that "a relatively small reduction in the price of oil during 1982 led to a slowdown of development in the Kuparuk River field" (Gov. Br. 19-20 n.26). An increase in tax, reducing the after-tax return, would have an identical impact. Congress is best able to avert these risks, and could enact an appropriate tax which shelters Alaskan production from this burden by Constitutional means.

Third, the large number of possible methods of saving the Tax itself counsels in favor of letting the Congress choose which legislative solution best meets our nation's interests. The Government alone in the course of this litigation has suggested no less than three cures: (1) extension of the Tax to Alaska, (2) exemption of newly discovered oil (see Gov. Br. 50-51 n.46), and (3) extension of the exemption to production "in all areas similar to the Arctic Circle or located more than 75 miles from a pipeline connection" (see Reply Brief for the Defendant United States of America and in Opposition to Motions for Summary Judgment, at 10).[59] These alternatives obviously carry radically different implications for revenue generation, disincentive to exploration and development of oil, and fairness to all taxpayers.

This Court has clearly recognized the wisdom of leaving to Congress the basic resolution of such critical policy choices. In *Marchetti* v. *United States*, 390 U.S. 39 (1968), for example, this Court refused a government invitation to save the occupa-

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[59] The final suggestion has evidently been dropped from the list of Government proposals.

tional wagering tax by restricting the use of information thereby obtained. Explaining its refusal, the Court said:

> "We cannot know how Congress would assess the competing demands of the federal treasury and of state gambling prohibitions; we are, however, entirely certain that the Constitution has entrusted to Congress, and not to this Court, the task of striking an appropriate balance among such values." 390 U.S. at 59-60.[60]

Fourth, an attempt to adopt any of the Government's proposals would require resolution of several interstitial problems, which are best left to the Congress. The Government's suggestion to judicially extend the Tax to Alaska, for example, would require the Court to decide the issue of whether the "TAPS adjustment," which under the original statute reduced the Tax on Sadlerochit oil (see Section 4996(d)), should be extended to the areas of Alaska that were originally exempt. The question is doubly perplexing because of Congress's subsequent repeal of the TAPS adjustment. See Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324, § 284. Again, in calculating the $227.3 billion in net revenue, collection of which triggers the start of a 33-month phaseout of the Tax (but no sooner than January 1988 and no later than January 1991), should the new judicially mandated revenues from Alaska be included? The legislative character of these choices is obvious.

Finally, Congress possesses broad power to enact substitute oil or energy tax legislation which could neutralize any effect that invalidation of the tax might have on the budgetary process. Changes in circumstances, wholly independent of this litigation, have already reduced by 75 percent the amount of revenue that the tax is expected to generate in future years.[61]

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[60] See also *Northern Pipeline Construction Co.* v. *Marathon Pipeline Co.*, 102 S. Ct. 2858, 2880 n.40 (1982).

[61] In lieu of the original estimates that the Tax would yield approximately $21 billion in net revenue annually, the Government has recently issued estimates of $5 billion per year ($30 billion over the next *six* years). See Government's Motion to Set the Case for Oral Argument During the Present Term of Court at 2.

The Congress alone is best able to custom-tailor new laws to address rapidly changing conditions and national needs.

Construction of a proper tax—which passes Constitutional muster—is a peculiarly legislative decision that will have an enormous impact on taxpayers and on critical national energy policies. Its design will require delicate balancing of policy values that is properly reserved to the Congress. In the absence of a mandate to the contrary from Congress, one may safely conclude that Congress would desire to resolve such issues itself.

## CONCLUSION

The Uniformity Clause requires that, in enacting excise taxes, Congress adhere to the principle of geographic uniformity and frame exceptions in functional terms such as severe climate or high production costs. Taxpayer appellees have been subjected to a severe burden by a Tax that disregards this simple requirement. Given this clear constitutional infirmity, the Court should affirm the District Court decision which invalidates the Tax, so that Congress can determine what tax provisions are appropriate in light of the relevant legislative policies including revenue need, fairness to taxpayers, and encouragement of domestic oil production.

Respectfully submitted,

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April 1983

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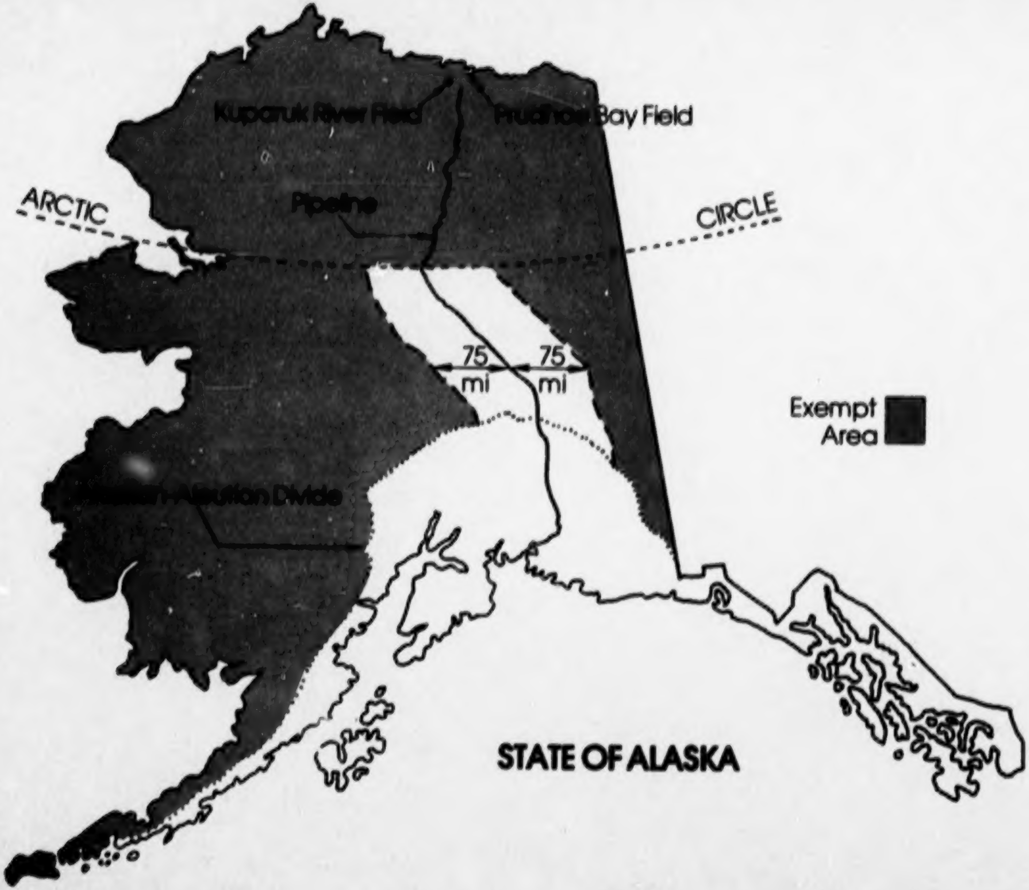
APPENDIX A


Kuparuk River Field
Prudhoe Bay Field
ARCTIC
CIRCLE
Pipeline
75 mi
75 mi
Exempt Area
Aleutian Divide
STATE OF ALASKA

# NO. 82-1066

## In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, APPELLANT

V.

HARRY PTASYNSKI, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

BRIEF FOR THE STATE OF LOUISIANA, APPELLEE

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IN THE
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UNITED STATES OF AMERICA, APPELLANT

v.

HENRY PTASYNSKI, ET AL., APPELLEES

APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

BRIEF FOR THE STATE OF LOUISIANA, APPELLEE

## STATEMENT OF THE CASE

At issue in this litigation is the constitutionality of Title I of the Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223, hereinafter referred to as the "Windfall Profit Tax Act" and cited to the Internal Revenue Code, as amended, 26 U.S.C.A. The United States District Court for the District of Wyoming held that the act violates the Uniformity Clause of the United States Constitution, U.S. Const., Art. I, §8, cl. 1, and the government has appealed.

Because the government's statement of the case is generally accurate in its description of the challenged statute and its summary of the proceedings below, there is no need for an extended discussion here. Nevertheless, the government has deemphasized certain procedural aspects

of the case, in particular, the interventions of the States of Louisiana and Texas. Because the claims of these intervening parties become important in connection with certain of the government's arguments,[1] a more complete understanding of their procedural status in the case is necessary.

The States of Louisiana and Texas moved in the District Court for leave to intervene as plaintiffs in order to assert their interest as States in having the Windfall Profit Tax Act declared unconstitutional and to obtain an order permanently enjoining the Commissioner of the Internal Revenue Service from further assessment and collection of the tax imposed by the act. The government opposed the intervention motions, arguing that the doctrine of sovereign immunity barred the States from asserting their claims and that the States lacked standing to pursue declaratory and injunctive relief. *See* R. at 289 and 347.

The District Court rejected the government's arguments, and granted the States' respective motions to intervene by order dated July 2, 1981. J. A. at 34. The authorities and principles supporting the District Court's decision are fully discussed in the memoranda filed by the States in support of their motions to intervene. *See* R. at 167 and 258. The States thus filed their complaints in inter-

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[1] Based on its erroneous characterization of the action as being merely a suit by the individual taxpayer plaintiffs for a refund of taxes, the government argues that for purposes of determining whether the Windfall Profit Tax Act is unconstitutional, the Court must limit its consideration to facts in existence during the period for which refunds are claimed. The government's erroneous characterization of the action is also the basis for its "ripeness" argument. The substance of the arguments will, of course, be addressed below. *See infra* at 25. Nevertheless, it is important for a correct resolution of the issues to recognize the independent status of the States of Louisiana and Texas as parties in this action, since their claims are not tied in any way to the period for which the individual taxpayer plaintiffs seek a refund.

vention asserting their claims for declaratory and injunctive relief, J. A. at 1 and 6, and the government answered those complaints on August 27, 1981. J. A. at 37 and 40. The government has not sought review of the District Court's order allowing the States to intervene.

Having become plaintiffs in the action by virtue of their interventions, the States of Louisiana and Texas filed their own motions for summary judgment, each seeking a declaration that the Windfall Profit Tax Act is unconstitutional under the Uniformity Clause of the United States Constitution, and each praying for an injunction restraining the Commissioner of the Internal Revenue Service from further assessment and collection of the windfall profit tax. J. A. at 48 and 55. The declaratory relief sought was granted by the District Court's amended judgment entered on November 15, 1982. R. at 833. This judgment should be affirmed.

## SUMMARY OF ARGUMENT

The Uniformity Clause of the United States Constitution contains but one limitation on the power of Congress to levy excise taxes. This limitation is narrowly drawn but absolute—all excises "shall be uniform throughout the United States." U.S. Const., Art. I, § 8, cl. 1. For almost 200 years, the courts of this country have consistently held that the uniformity required is strictly geographic uniformity and that no other factors are properly considered. The courts have repeatedly rejected arguments that Congress should have accommodated differences in local conditions, state laws or individual situations, in the interest of achieving intrinsic uniformity with respect to the operation of a particular tax. In every instance, the constitutionality of the tax in question has been

determined solely by reference to its geographical application. In the oft-quoted words of this Court, a tax is uniform within the meaning of the Constitution when "it operates with the same force and effect in every place where the subject of it is found." *Head Money Cases,* 112 U.S. 580, 594, 5 S.Ct. 247, 252 (1884).

The Windfall Profit Tax Act itself characterizes the tax imposed as an excise, and the government concurs in this characterization. There is no question but that the tax is governed by and must comply with the constitutional limitation contained in the Uniformity Clause. Similarly, there is no question but that the Windfall Profit Tax Act on its face exempts a certain geographically defined area from the operation of the tax. This is not a case where Congress has merely taken geographical considerations into account in defining the subject of taxation. Rather, Congress has taxed the same subject differently solely on the basis of its geographic location. Since by definition the tax does not operate with the same force and effect in every place where the subject of it is found, the District Court was clearly correct in declaring the Windfall Profit Tax Act to be unconstitutional.

In addition to violating the express prohibition of the Uniformity Clause, the act violates the underlying purpose of the clause because of its discrimination in favor of Alaska. To the extent that *any* oil produced in Alaska is exempt from the tax, that State's industry and economy is promoted at the expense of the other States. There is no support for the government's contention that the purpose of the clause was limited to preventing combinations of States from imposing taxes that grant an undue preference to their own States or to impose an oppressive discrimination against a minority. The drafters' intent was clearly to

prevent not just all discrimination, but even the possibility of discrimination. Equally unsupportable is the government's contention that the purpose of the clause is not violated if Congress has a rational justification for drawing geographic distinctions in the imposition of excises. Indeed, the justifications suggested by the government here—a desire to accommodate special circumstances purportedly confined to a limited geographic area and a desire to distribute the tax burden more equitably among the States—are particularly inappropriate since the drafters specifically rejected similar considerations when they chose to adopt a geographic standard for uniformity. In any event, the jurisprudence confirms that *no* justification can render a geographically non-uniform tax constitutional.

In an attempt to buttress its arguments on the merits, the government refers throughout its brief to a number of political and economic factors, implicitly suggesting that these factors are somehow relevant to a determination of constitutionality under the Uniformity Clause. While the correctness of the government's assertions regarding these factors is debatable, it is also irrelevant. Regardless of whether the effect is *de minimis*, geographic non-uniformity in the imposition of excise taxes is absolutely prohibited by the Uniformity Clause, and this is true regardless of the fiscal consequences to the government of maintaining the unconstitutional tax.

In a final attempt to save at least some of the act from invalidation, the government contends that the act's unconstitutionality can be cured by severing the provisions which create the exemption for certain Alaskan oil. Despite its simplistic presentation of the question as being whether the general separability clause contained in the Internal Revenue Code is dispositive of the severability

question, the government's argument reflects its awareness that notwithstanding an applicable separability clause, the determining factor is always legislative intent. Properly phrased, the question is whether Congress would have enacted the Windfall Profit Tax Act in its present form absent the exemption for certain Alaskan oil. In view of the fact that the act is a comprehensive integrated scheme designed not merely to raise tax revenues, but to do so without overly discouraging domestic oil production, and in view of the fact that the exemption for certain Alaskan oil was considered to be an integral part of the delicate balance that was struck between these competing objectives, and, indeed, was perhaps the overriding factor in Congress' decision to tax "newly discovered" oil, the conclusion is inescapable that the act would not have been enacted in its present form absent the exemption.

Additionally, to extend the tax to oil which Congress clearly intended to exempt under the guise of severance would be to engage in impermissible judicial legislation. The myriad of alternatives suggested by the government's arguments in this case (extension of the tax to exempt Alaskan oil, extension of the tax to exempt Alaskan oil lying within the boundaries of the State of Alaska, extension of the exemption to production in all areas similar to the Arctic Circle or areas located more than 75 miles from a pipeline connection, extension of the exemption to all newly-discovered oil, or invalidation of all of the Titles contained in Pub. L. No. 96-223) effectively illustrates that Congress, not the Court, should be entrusted with the task of rewriting the Windfall Profit Tax Act to comport with constitutional requirements in the way that will best effectuate the legislative purpose.

## ARGUMENT

### I. The Windfall Profit Tax Violates the Uniformity Clause of the United States Constitution.

#### A. The Uniformity Clause Requires That Federal Excise Taxes Be Geographically Uniform.

The Uniformity Clause of the United States Constitution, Article I, § 8, cl. 1, provides:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts, and Excises...; *but all* Duties, Imposts and *Excises shall be uniform throughout the United States.*

(Emphasis added.) There are no qualifications or limitations contained in the clause; the requirement of uniformity is absolute. When this Court was first presented with an opportunity to comment on the clause shortly after its adoption, Justice Paterson expounded upon the advantages of having such a rule for indirect taxes. Rejecting arguments that a tax on carriages should be governed by the rule of apportionment, Justice Paterson wrote that if apportionment were to be required,

> [w]e shall be obliged to resort to intricate and endless valuations and assessments, in which everything will be arbitrary, and nothing certain. There will be no rule to walk by. *The rule of uniformity, on the contrary, implies certainty,* and leaves nothing to the will and pleasure of the assessor. In such case, the object and the sum coincide, the rule and the thing unite, and of course there can be no imposition. *The truth is, that the articles taxed in one state should be taxed in another; in this way, the spirit of jealousy is*

> *appeased, and tranquillity preserved; in this way, the pressure on industry will be equal in the several states, and the relation between the different objects of taxation duly preserved.*

*Hylton v. United States*, 3 U.S. (3 Dall.) 171, 180 (1796). (Emphasis added.)

That the rule of uniformity is not subject to any qualification or limitation has never been questioned. The only issue that has ever been raised is whether the uniformity required is intrinsic or geographic. On the one hand, it has been argued that Congress should accommodate differences in local conditions, state laws or individual situations, so as to achieve intrinsic uniformity with respect to the operation of a particular tax. On the other hand, it has been argued that the Constitution requires strictly geographic uniformity, despite the fact that a geographically uniform tax might operate unequally due to particular local conditions, and thus be intrinsically non-uniform.

This issue was first addressed by the Court in the *Head Money Cases*, 112 U.S. 580, 5 S.Ct. 247 (1884), where the argument was made that a geographically uniform tax on passengers arriving in the United States by ocean navigation was unconstitutional because only those states with ports were affected by the tax. It was argued that to be constitutionally uniform, the tax had to apply to passengers arriving by railroad or other inland modes of conveyance as well, since only then would the tax operate with intrinsic equality. The Court squarely rejected this argument, stating:

> The uniformity here prescribed has reference to the various *localities* in which the tax is intended

> to operate. "It shall be uniform throughout the United States."...*The tax is uniform when it operates with the same force and effect in every place where the subject of it is found.*

112 U.S. at 594, 5 S.Ct. at 252. (Emphasis added.) Since the tax operated with exactly the same effect in every place where foreign passengers arriving by ocean navigation could be landed, it was held to be constitutional.

In *Knowlton v. Moore,* 178 U.S. 41, 20 S.Ct. 747 (1900), the Court confirmed that this construction of the clause comported with the intent of its drafters. After an exhaustive review of the legislative history of the clause, the Court concluded that words of the clause "do not signify an intrinsic but simply a geographical uniformity." 178 U.S. at 106, 20 S.Ct. at 772. In support of this conclusion, the Court discussed the debates in the Continental Congress where "the pith of the controversy...was that even, although the same duty or the same impost or the same excise was laid all over the United States, it might operate unequally by reason of the unequal distribution or existence of the article taxed among the respective States." 178 U.S. at 104, 20 S.Ct. at 772. By the time the Constitutional Convention was convened, the words "uniformity throughout the United States" had acquired the unquestioned meaning of geographic uniformity. 178 U.S. at 101, 20 S.Ct. at 771. Nevertheless, there were still those who argued that intrinsic uniformity should be required. 178 U.S. at 104-09, 20 S.Ct. at 772-73. These arguments were rejected. It is clear from the Court's discussion that a conscious decision was made to require strictly geographic uniformity, notwithstanding full recognition of the fact that intrinsic inequalities might result.

Based on this legislative history, the *Knowlton* Court found it irrelevant that the rate of the tax on legacies there under consideration depended on a factor which varied with the testamentary and intestacy laws of the various states. The Uniformity Clause was held to impose a "purely geographical" limitation, 178 U.S. at 96, 20 S.Ct. at 769, and since the same degree of relationship wherever existing was levied on at the same rate throughout the United States, the tax was held to be geographically uniform and therefore constitutional. 178 U.S. at 106, 20 S.Ct. at 773. Following the rule first adopted in the *Head Money Cases,* the Court reiterated that the Uniformity Clause requires "that whatever plan or method Congress adopts for laying the tax in question, the same plan and the same method must be made operative throughout the United States; that is to say, that wherever a subject is taxed anywhere, the same must be taxed everywhere throughout the United States, and at the same rate." 178 U.S. at 84, 20 S.Ct. at 764. (Emphasis added.)

In subsequent cases as well, the Court has repeatedly held that the uniformity required is strictly geographic uniformity. Thus, in *Florida v. Mellon,* 273 U.S. 12, 17, 47 S.Ct. 265, 266 (1927), the Court held that the Uniformity Clause requires "that the law shall be uniform in the sense that by its provisions the rule of liability shall be the same in all parts of the United States," and in *La Belle Iron Works v. United States,* 256 U.S. 377, 392, 41 S.Ct. 528, 532 (1921), the Court construed the clause as requiring "territorial" uniformity. Justice Field in his opinion in *Pollock v. Farmers' Loan & Trust Co.,* 157 U.S. 429, 592, 15 S.Ct. 673, 694 (1895), explained:

> The uniformity thus required is the uniformity throughout the United States of the duty, impost,

> and excise levied. That is, the tax levied cannot be one sum upon an article at one place and a different sum upon the same article at another place. The duty received must be the same at all places throughout the United States, proportioned to the quantity of the article disposed of or the extent of the business done.[2]

Just as consistently, the Court has refused to consider anything other than the geographical application of taxes challenged under the Uniformity Clause. As the Court stated in *Patton v. Brady,* 184 U.S. 608, 623, 22 S.Ct. 493, 498 (1902): "Geographical uniformity being therefore that only which is prescribed by the Constitution the courts may not add new conditions...."[3]

In light of the universal and unwaivering recognition that the Uniformity Clause requires strictly geographic uniformity, it is not surprising that there are no reported cases in which the courts have been presented with a duty, impost or excise that was not geographically uniform. Not until passage of the Windfall Profit Tax Act has Congress dared to disregard the unambiguous limitation on its taxing power that is contained in the Uniformity Clause. Indeed, there is only one case in which there was even a colorable claim that Congress had violated the requirement that duties, imposts and excises be geographically uniform.

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[2] *See also* Bromley v. McCaughn, 280 U.S. 124, 50 S.Ct. 46 (1929); Charles C. Steward Mach. Co. v. Davis, 301 U.S. 548, 57 S.Ct. 883 (1937); Billings v. United States, 232 U.S. 261, 34 S.Ct. 421 (1914); Brushaber v. Union Pac. R.R. Co., 240 U.S. 1, 36 S.Ct. 236 (1916).

[3] *See also* Fernandez v. Wiener, 326 U.S. 340, 66 S.Ct. 178 (1945); Riggs v. Del Drago, 317 U.S. 95, 63 S.Ct. 109 (1942); Phillips v. Commissioner of Internal Revenue, 283 U.S. 589, 51 S.Ct. 608 (1931); Poe v. Seaborn, 282 U.S. 101, 51 S.Ct. 58 (1930); Flint v. Stone Tracy Co., 220 U.S. 107, 31 S.Ct. 342 (1911).

In *Downes v. Bidwell*, 182 U.S. 244, 21 S.Ct. 770 (1901), the provision of the Foraker Act which imposed an import duty on merchandise brought into the United States from Puerto Rico was challenged as being violative of the Uniformity Clause. The act was upheld, but only because the Court concluded that territories such as Puerto Rico are not part of the United States for purposes of the requirement that imposts "be uniform throughout the United States." The Court clearly recognized that absent this finding, the facially non-uniform act would have been unconstitutional. *See* 182 U.S. at 249, 21 S.Ct. at 772.

There can be no contention here as there was in *Downes v. Bidwell* that the locality exempted by the Windfall Profit Tax Act is not within the United States.[4] As will be shown more fully below, the Uniformity Clause is clearly applicable in this case, and it just as clearly requires that the Windfall Profit Tax Act be declared unconstitutional.

**B. The Windfall Profit Tax Act Unconstitutionally Exempts Certain Production from the Tax Solely on the Basis of Its Geographic Location.**

The Windfall Profit Tax Act characterizes the tax imposed as being an excise on the "windfall profit" from domestic crude oil, other than "exempt oil," produced in the United States after February 29, 1980. I.R.C. §§ 4986(a), 4991(a), 4996(b)(7). "Exempt oil" is defined to

[4] The government points out that in addition to exempting areas within the State of Alaska, the act exempts areas in the federal outer continental shelf. Brief for the United States at 20-21 n.27, 32-33 n.33. Assuming that Congress can constitutionally exempt the latter areas because they are not part of the United States for purposes of the Uniformity Clause, a problem of severability is presented. *See infra* at 42. Nevertheless, this in no way mitigates the unconstitutionality of treating production in the State of Alaska different from production in other States.

include "any exempt Alaskan oil," which in turn is defined as:

> [A]ny crude oil (other than Sadlerochit oil) which is produced—
>
> (1) from a reservoir from which oil has been produced in commercial quantities through a well located north of the Arctic Circle, or
>
> (2) from a well located on the northerly side of the divide of the Alaska-Aleutian Range and at least 75 miles from the nearest point on the Trans-Alaska Pipeline System.

I.R.C. §§ 4991(b), 4994(e).

Despite occasional references to the subject of the tax as being "windfall profits," the government concedes that in reality the tax is imposed "upon the activity of mineral extraction." J. S. at 14-15 n.22. Therefore, the government agrees that the tax is properly classified as an excise. There is no question but that the act is governed by and must comply with the constitutional limitation contained in the Uniformity Clause.

Similarly, despite its attempt to characterize the Alaskan exemption as being a classification that "merely takes geographical considerations into account," the government concedes that the exemption is "geographically defined so as to exclude oil located in all of the 50 states except portions of Alaska." Brief for the United States at 28. Applying the test of geographic uniformity, it is clear that the tax does not operate with the same force and effect in every place where the subject of it is found. The extraction of crude oil is identically taxed throughout the United States with one important exception—if the oil is extracted north of the Arctic Circle or on the northerly side of the

divide of the Alaska-Aleutian Range and at least 75 miles from the nearest point on the Trans-Alaska Pipeline System, it is not taxed at all. Since the tax imposed by the act is not "uniform throughout the United States" as that phrase has been consistently construed, the tax must be declared invalid as being violative of the Uniformity Clause of the United States Constitution.

Although the simplicity of this conclusion may be somewhat obscured by the government's arguments, its correctness cannot be refuted. The government takes great pains to establish that Congress can take geographical considerations into account in drawing tax classifications without violating the Uniformity Clause, and to show that the Alaskan exemption is such a classification. Nevertheless, the same authorities relied upon by the government to establish the former proposition show the fallacy of the latter. These authorities establish that the test for constitutionality under the Uniformity Clause is whether the tax operates with the same force and effect in every place where the subject of it is found. If it does, it is irrelevant whether Congress took geographical considerations into account in defining the subject to be taxed or whether the subject exists only in certain geographic areas. There is simply no support for the government's suggestion that the Uniformity Clause requires Congress to have a rational justification, albeit subject to "special scrutiny," for defining the subject of taxation as it does. The *only* requirement is that the tax be geographically uniform.

Interestingly enough, this rule was first applied in the *Head Money Cases, supra,* the decision so heavily relied upon by the government here. As the government correctly points out, the issue there was the constitutionality of a duty levied against transportation companies

on foreign passengers entering the United States by vessel. Brief for the United States at 31. The government is also correct in pointing out that since the subject of the tax was foreign passengers arriving by navigation, not foreign passengers generally, and since the tax operated precisely alike in every port of the United States where such passengers could be landed, the tax was constitutionally uniform in that it operated with the same force and effect in every place where the subject of it was found. *Id.* at 33-34. *See also supra* at 8-9. The remainder of the government's analysis, however, cannot withstand scrutiny.

In asserting that "[t]he court squarely rejected the contention that the duty violated the Uniformity Clause on the ground that it did not operate with strict geographic uniformity since, by its terms, it could apply only in states having sea ports (a matter necessarily determined by their geography) and not in landlocked states where foreign passengers might arrive by railroad or other inland mode of conveyance," *id.* at 31, the government has confused intrinsic with geographic uniformity. Certainly, the duty was intrinsically non-uniform since its subject did not exist in inland states. It was in this context that the Court observed that "[p]erfect uniformity and perfect equality of taxation, in all the aspects in which the human mind can view it, is a baseless dream...." 112 U.S. at 595, 5 S.Ct. at 252. Yet the Court held that since the duty was *geographically* uniform, there existed "substantial uniformity within the meaning and purpose of the Constitution." *Id.*[5]

[5] Interestingly enough, although the duty operated only in certain areas, no "special scrutiny" was required. As in all of the subsequent cases construing the Uniformity Clause, the Court in the *Head Money Cases* found it irrelevant that the duty might operate differently in different areas and thus be intrinsically non-uniform.

Similarly misplaced is the government's reliance on the Court's statement that "the evil to be remedied by this legislation has no existence in our inland borders, and immigration in that quarter needed no such regulation." *Id.* The ultimate question in the Court's view was not "whether Congress had a reasonable basis for distinguishing between the activity that was taxed in coastal states and the similar activity that was untaxed in inland states," Brief for the United States at 32, but whether the tax operated "with the same force and effect in every place where the subject of it [was] found." 112 U.S. at 594, 5 S.Ct. at 252. The "evil to be remedied" in the *Head Money Cases* was the flood of uneducated, poor immigrants arriving from overseas, and the purpose of the tax was to establish a fund to care for those immigrants. Because this problem was geographically isolated in the sense that it only existed in ports, legislation to resolve the problem could take into account differences existing between different parts of the country by defining the subject of the tax in terms of ports. The Court's holding makes it clear, however, that the tax was constitutional only because it applied uniformly to *all* ports throughout the United States.[6]

Certainly, Congress has the power to choose subjects of taxation that, as a matter of geographic considerations alone, exist only in certain states—*but only if* wherever the subject does exists, it is taxed according to the same plan and at the same rate. Similarly, Congress has the power to

[6] To the extent that the government views the *Head Money Cases* as requiring Congress to have a rational basis for distinguishing between different, albeit similar, subjects of taxation, the government has misconstrued the case. The case stands only for the proposition that the *same* subject must be given equal tax treatment wherever it exists. Indeed, there is no authority which suggests that the Uniformity Clause requires Congress to have a rational basis for distinguishing between different subjects of taxation.

take geographical considerations into account in defining subjects of taxation so as to remedy specific national problems—but again, *only if* the subject is taxed according to the same plan and at the same rate wherever it exists. Thus, while Congress may have the power to take geographical considerations into account in drawing legitimate tax classifications, the emphasis should be on *legitimate*. Under the *Head Money Cases*, this means that the classification must be such that the tax will operate with the same force and effect in every place where the subject of it is found.

The other decisions under the Uniformity Clause relied upon by the government support rather than refute this conclusion. For example, in *Knowlton v. Moore, supra*, the Court found it irrelevant that the inheritance tax there at issue might operate with intrinsic inequality due to differing state testamentary and intestacy laws. No "special scrutiny" was required, only the test of geographic uniformity. Since the same degree of relationship wherever existing was levied on at the same rate throughout the United States, the tax was held to be constitutional. *See supra* at 9-10. Whether or not Congress had a rational basis for defining the subject of the tax as it did was not even discussed.[7]

The government has similarly misconstrued the purportedly analogous decisions of this Court construing the Bankruptcy Clause. As the government points out, the requirement contained in Article I, § 8, cl. 4, of the

[7] *See also* Flint v. Stone Tracy Co., 220 U.S. 107, 31 S.Ct. 342 (1911); Billings v. United States, 232 U.S. 261, 34 S.Ct. 421 (1914); Fernandez v. Wiener, 326 U.S. 340, 66 S.Ct. 178 (1945). These cases confirm that while Congress may choose subjects of taxation that do not exist equally throughout the United States, it can only do so provided the subjects are equally taxed wherever they exist.

Constitution that bankruptcy laws be uniform throughout the United States is similar to that contained in the Uniformity Clause. Nevertheless, the government's reliance on this Court's construction of the Bankruptcy Clause in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 95 S.Ct. 335 (1974), is misplaced. In that case, the Court was presented with an unusual statute which by its terms was operative only for a 180-day period, a period which had expired before the case was presented. Although by its terms the statute was applicable only to reorganization proceedings in a statutorily defined region, it was affirmatively established that no reorganization proceeding was pending outside the defined region either on the effective date of the statute or during the following 180-day period. Thus, the Court was able to conclude that "[t]he definition of the region does not obscure the reality that the legislation applies to all railroads under reorganization pursuant to § 77 during the time the Act applies." 419 U.S. at 161, 95 S.Ct. at 367. In holding that this was sufficient to render the statute constitutionally uniform, the Court specifically confirmed that its construction of the Bankruptcy Clause comported with its construction of other "uniform" provisions of the Constitution, citing the *Head Money Cases*.

It is in the context of the Court's holding that one must read the statement, relied upon by the government, that the uniformity provision does not deny Congress the power to take into account differences that exist between different parts of the country and to fashion legislation to resolve geographically isolated problems. Brief for the United States at 35. Certainly, the Court was not saying that Congress has carte blanche to disregard the requirement of uniformity whenever a lack of uniformity can be justified by differences existing in particular parts of the country or by the need to resolve geographically isolated

problems. Otherwise, the Court would not have had to resolve the question of whether the statute was in fact geographically uniform. The geographically isolated problem in *Regional Rail Reorganization Act Cases* was the pendency of railroad reorganization proceedings only in a particular region. Since the reorganization proceedings affected by the statute were the only ones in fact existing in the country, the statute was able to take into account differences existing between different parts of the country and still operate with the same force and effect in every place where the subject of it was found. Thus, although Congress may define subjects of legislation geographically to remedy specific national problems, it can only do so if *in reality*, if not by its terms, the law applies equally to the same subject wherever it exists.

This construction of *Regional Rail Reorganization Act Cases* was recently confirmed in *Railway Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 102 S.Ct. 1169 (1982), where the Court held that a bankruptcy law which applied only to one named railroad was unconstitutionally non-uniform. Regarding its prior holding in *Regional Rail Reorganization Act Cases*, the Court stated:

> In the *3R Act Cases*, we upheld Congress' response to the existing rail transportation crisis in the Northeast. Since no railroad reorganization proceeding was then pending outside of the region defined by the Regional Rail Reorganization Act of 1973 (3R Act), 87 Stat. 985, 45 U.S.C. § 701 *et seq.*, the Act in fact operated uniformly upon all railroads then in bankruptcy proceedings.

455 U.S. at 469, 102 S.Ct. at 1176. The Court concluded that to survive scrutiny under the uniformity requirement of the Bankruptcy Clause, a law must at least apply uni-

formly to a defined class of debtors. As the Court stated: "To hold otherwise would allow Congress to repeal the uniformity requirement from Art. I, § 8, cl. 4, of the Constitution." 455 U.S. at 473, 102 S.Ct. at 1178.

Thus, the Court's construction of the uniformity requirement of the Bankruptcy Clause is consistent with its construction of the uniformity requirement of the Uniformity Clause: Although Congress may select some and omit other possible subjects for legislation, the law must at least apply uniformly to the defined subject chosen. As the Court first stated in the *Head Money Cases*, to be constitutionally uniform, a law must operate "with the same force and effect in every place where the subject of it is found."

The government's reliance on decisions construing the Port Preference Clause contained in Article I, § 9, cl. 6, of the Constitution is also misplaced. As the government's quotation from *Commission v. Texas & N.O.R. Co.*, 284 U.S. 125, 52 S.Ct. 74 (1931), shows, the Port Preference Clause has not been construed to proscribe laws "merely because they incidentally favored or prejudiced some line of commerce in one state or another." Brief for the United States at 38. This might also be said of the Uniformity Clause, since it has not been construed to proscribe taxes that only incidentally favor or prejudice certain areas because of the operation of geographically uniform taxes on subjects that do not exist equally among the various states. Just as the Court recognized in *Commission v. Texas & N.O.R. Co.* that Congress would be stripped of much of its power under the Commerce Clause if the Port Preference Clause were construed to prohibit facility-specific regulations that only incidentally favored or discriminated against particular ports because of the geographic location of the facilities, the Court in *Knowlton*

*v. Moore*, recognized that the power of taxation would be rendered impotent if the Uniformity Clause were construed to prohibit geographically uniform taxes that only incidentally favored or discriminated against particular areas because of the geographic location of the subjects taxed. 178 U.S. at 109, 20 S.Ct. at 774. As the Court noted in *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 435 (1855), it is only *direct* preferences or discriminations that are proscribed by the Port Preference Clause. The same is true of the Uniformity Clause.[8]

Keeping in mind the foregoing analysis of the authorities relied upon by the government, the conclusion is inescapable that the Windfall Profit Tax Act cannot be sustained as an excise that merely takes geographic considerations into account.

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[8] This is not to say, however, that only "systematic" preferences or discriminations are prohibited, if by that latter phrase it is meant that a part of a State can be preferred or discriminated against with impunity so long as another part of the State is treated the same as any other State. In support of its argument that this is in fact the meaning of the Port Preference Clause cases, the government quotes the Court's statement in *Wheeling & Belmont Bridge Co.* that discrimination between individual ports within the same or different states is not forbidden, but only discrimination between States. Brief for the United States at 38. While this may have been an additional ground for finding that the incidentally discriminatory regulation there at issue was not unconstitutional, it is unlikely that the same reasoning would be applied in all cases. For example, if Congress were to provide that vessels bound for San Francisco must enter and clear at Portland, Oregon, Los Angeles and other California ports would not be discriminated against, yet the regulation would clearly be forbidden by the Port Preference Clause. Indeed, this is exactly the type of regulation that the drafters of the clause intended to preclude. *See Knowlton v. Moore*, 178 U.S. at 104, 20 S.Ct. at 772. In any event, in none of the various articulations of the requirement imposed by the Uniformity Clause has there ever been a suggestion that an entire State must be singled out for preferential or discriminatory treatment in order for a violation to occur. The clause has been consistently construed to prohibit the unequal treatment of a particular geographic locality, regardless of whether that locality comprises part of one State, all of one State, or more than one State.

While the *Head Money Cases* establishes that Congress can take geographic considerations into account in defining the subject of taxation so as to remedy a specific national problem, it also establishes that Congress can only do so provided it does not violate the constitutional requirement that the tax must operate with the same force and effect wherever the subject of it is found. In enacting the Windfall Profit Tax Act, Congress clearly did more than take geographical considerations into account. It defined an exemption from the tax solely on the basis of geographic location so that by definition, the tax does not operate with the same force and effect in every place where the subject of it is found. This same analysis applies regardless of whether the subject is considered to be the extraction of crude oil, windfall profits from crude oil, crude oil itself, or merely "newly discovered" crude oil, as the government variously suggests.

Similarly, while the Court in the *Regional Rail Reorganization Act Cases* upheld a bankruptcy law that contained geographically defined distinctions, it did so only because it was able to conclude that in fact, if not by its terms, the law operated with the same force and effect in every place where the subject of it was found during the entire time that the law was in effect. Obviously, the same conclusion cannot be reached in this case since crude oil is currently being produced in the exempt areas, and it is not being subjected to the tax. Despite this clear distinction, the government makes two arguments in an attempt to fit the case within the rationale of the *Regional Rail Reorganization Act Cases*.

First, the government attempts to draw a distinction between crude oil generally and crude oil produced in the exempt areas. The government also suggests that the

"windfall profits" generated by the former are somehow different from those generated by the latter. At least, argues the government, Congress had reason to believe that the remote location, fragile environment and extreme climatic conditions made production in the exempt area different from production in other areas. Nevertheless, even assuming that crude oil produced in remote locations where the environment is fragile and the climatic conditions are extreme is so different from crude oil generally as to constitute a different subject of taxation, to fit this case within even an extension of the rationale of the *Regional Rail Reorganization Act Cases,* the Court would have to be able to conclude that during the life of the Windfall Profit Tax Act, all exempt Alaskan crude oil will qualify as this different type of oil and that none of this different type of oil will be produced anywhere else.

Of course, this is impossible since Congress has not specified the parameters of what (other than geographic location) makes the exempt crude oil different from crude oil generally. How far must the production be from existing markets? How far must it be from existing transportation systems? How extreme must the climate be and in what respects? What constitutes a "fragile" environment? All of these questions and more must be answered before it can be determined whether, despite its terms, the Windfall Profit Tax Act will in fact operate with the same force and effect in every place where this particular type of oil is found. Even then, it may still be impossible to say that during the entire life of the act, the operation of the tax will in fact remain uniform.

To require Congress to define subjects of taxation in terms of the conditions which set them apart for different treatment rather than in geographic terms is quite obviously

more than to require "mere niceties of draftsmanship." It requires Congress to focus on and precisely define the factors, other than geographic location, that make the subject different. Additionally, it provides substantive protection by ensuring that the tax will in fact be geographically uniform. After all, it is uniformity that is required by the Constitution, not merely a belief by Congress that its enactment will be uniform.

In a second attempt to fit this case within the rationale of the *Regional Rail Reorganization Act Cases*, the government asserts that the tax in fact operated with geographic uniformity during the period for which the individual taxpayer plaintiffs claim a refund because no exempt Alaskan oil was produced during that period. Nevertheless, the argument that the Court can only consider the operation of the tax during the period for which the individual taxpayer plaintiffs have claimed a refund completely ignores the independent status of the States of Louisiana and Texas who were granted leave to intervene to assert their interests as States in having the act declared unconstitutional.[9] Obviously, the refund period has no relation whatsoever to the claims raised by the States in their complaints in intervention and in their motions for summary judgment. Even as regards the claims

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[9] The government's passing observation that it is "highly questionable" whether the States would have standing to assert their claims and its assertion that the doctrine of sovereign immunity would bar the States' suits are surprising in view of the fact that the government has not sought review of the District Court's ruling which allowed the States to assert their claims. The government adamantly opposed the States' interventions for the same reasons alluded to in footnote 36 of its brief to this Court. After careful consideration of these arguments, the District Court allowed the States to intervene as plaintiffs to assert their claims, a decision that necessarily encompassed a resolution of these issues contrary to the government's assertions. *See supra* at 2-3, R. at 50, 254, 271-73, and 348-50. Their claims cannot now be ignored.

of the individual taxpayer plaintiffs, however, the argument is insupportable.

The fallacy of the government's argument lies with its premise that the Windfall Profit Tax Act only became unconstitutional once exempt Alaskan oil was actually produced. It is not production of exempt oil that renders the act unconstitutional, but a lack of geographic uniformity which is apparent on the face of the act. This is not a case where a facially constitutional measure is being challenged solely on the ground that it is unconstitutional as applied. Nor is this a case where the Court can conclude that despite its facial unconstitutionality, the act in fact operated constitutionally the entire time that it was in effect. To accept the government's argument would require an unwarranted extention of the rationale of the *Regional Rail Reorganization Act Cases* and a complete distortion of its holding.[10]

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[10] The government attempts to buttress its argument on the merits by asserting that until exempt Alaskan oil was actually produced, the individual taxpayer plaintiffs suffered no injury. Brief for the United States at 42. Nevertheless, the existence of injury is not determinative of the merits of the taxpayers' claims, but only their standing to assert those claims. Although the government concedes that the taxpayers have standing, Brief for the United States at 41 n.35, it loses sight of the fact that the injury which gives them standing is not the favorable treatment given to others, but rather it is having to pay a facially unconstitutional tax.

A proper understanding of the injury suffered by the individual taxpayer plaintiffs also answers the government's related argument that the doctrine of "ripeness" precludes a decision in this case. As the government points out, under the doctrine of "ripeness," a court will generally not decide an issue unless the alleged constitutional injury has actually occurred, or in injunctive suits, unless constitutional injury is imminent. Brief for the United States at 40-41. In this case, the injury was sustained when the individual taxpayer plaintiffs were forced to pay the unconstitutional tax. The States likewise were injured prior to the actual commencement of production in the exempt areas, since from the date of its enactment, the act created an incentive for production in the State of Alaska which was not given to other States.

The Port Preference Clause cases relied upon by the government likewise fail to establish the constitutionality of the Windfall Profit Tax Act. Unlike the incidentally preferential regulations at issue in those cases, the Windfall Profit Tax Act grants an explicit and direct geographical preference to Alaska.

Thus, unlike the duty in the *Head Money Cases*, the Windfall Profit Tax Act does not by its terms apply to the same subject wherever it exists. Unlike the *Regional Rail Reorganization Act Cases*, it is impossible for the Court to conclude that despite its terms, the act will in fact apply to the same subject wherever it exists. Finally, unlike the legislation challenged in the Port Preference Clause cases, the act grants an explicit and direct preference to Alaska which discriminates against the other States. There is no escape from the conclusion that the Windfall Profit Tax Act violates the Uniformity Clause and that it is therefore unconstitutional.

### C. The Windfall Profit Tax Act Violates the Underlying Purpose of the Uniformity Clause Because It Discriminates in Favor of Alaska and Against the Remaining 49 States.

It is clear from the language of the Uniformity Clause and the jurisprudence construing it that the only relevant criteria for judging the constitutionality of an indirect tax is its geographic application. Thus, if an indirect tax is not geographically uniform, it is unconstitutional, regardless of any discrimination which might result from that non-uniformity.[11] Nevertheless, it is equally clear

[11] In a recent case construing the analogous uniformity requirement for bankruptcy laws, this Court recognized: "The issue is not whether Congress has discriminated against the Rock Island estate, but

from the legislative history of the clause that its underlying purpose was to preclude the possibility of such discrimination. Similarly, while the clause has been consistently construed in terms of "territorial" uniformity and as requiring that an indirect tax operate "with the same force and effect *in every place* where the subject of it is found," the legislative history of the clause shows that the drafters were primarily concerned with the possible discrimination against States that might result if indirect taxes were not required to be geographically uniform.

There is no question but that Justice Story's explanation of the purpose of the Uniformity Clause is the proper one. Since all of the parties rely on this explanation, an extended quotation may be appropriate. Justice Story wrote:

> The answer to the...[uniformity requirement] may be given in a few words. It was to cut off all undue preferences of one State over another in the regulation of subjects affecting their common interests. Unless duties, imposts, and excises were uniform, the grossest and most oppressive inequalities, vitally affecting the pursuits and employments of the people of different States, might exist. The agriculture, commerce, or manufactures of one State might be built up on the ruins of those of another; and a combination of a few States in Congress might secure a monopoly of certain branches of trade and business to themselves, to the injury, if not to the destruction, of their less favored neighbors. The Constitution, throughout all its provisions, is an

(Footnote 11 continued)
whether RITA's employee protection provisions are uniform bankruptcy laws. The uniformity requirement of the Bankruptcy Clause is not an Equal Protection Clause for bankrupts." *Railway Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 470 n.11, 102 S.Ct. 1169, 1177 (1982).

> instrument of checks and restraints, as well as of powers. It does not rely on confidence in the general government to preserve the interests of all the States. It is founded in a wholesome and strenuous jealousy, which, foreseeing the possibility of mischief, guards with solicitude against any exercise of power which may endanger the States, as far as it is practicable. If this provision as to uniformity of duties had been omitted, although the power might never have been abused to the injury of the feebler States of the Union, (a presumption which history does not justify us in deeming quite safe or certain,) yet it would, of itself, have been sufficient to demolish, in a practical sense, the value of most of the other restrictive clauses in the Constitution. New York and Pennsylvania might, by an easy combination with the Southern States, have destroyed the whole navigation of New England. A combination of a different character, between the New England and the Western States, might have borne down the agriculture of the South; and a combination of a yet different character might have struck at the vital interests of manufacturers. So that the general propriety of this clause is established by its intrinsic political wisdom, as well as by its tendency to quiet alarms and suppress discontents.

J. Story, Commentaries on the Constitution of the United States 683 (4th ed. 1873). It is clear from Justice Story's explanation that the individual States were intended beneficiaries of the Uniformity Clause, and that the purpose of the clause was to prevent the possibility that various combinations of States might abuse the federal taxing power by giving one State preferential treatment over another.

After an exhaustive review of the legislative history of the Uniformity Clause, this Court similarly concluded that "the possible discrimination against one or more States was the only thing intended to be provided for by the rule which uniformity imposed upon the power to levy duties, imposts, and excises." *Knowlton v. Moore*, 178 U.S. 41, 89, 20 S.Ct. 747, 766 (1900). The Court pointed out that in discussions regarding the need to create a federal government which would have the necessary taxing power, "the sole and the only question which was ever present and in every form was discussed, was the operation of any taxing power which might be granted to Congress upon the respective states; in other words, the discrimination as regards states which might arise from a greater or lesser proportion of any tax being paid within the geographical limits of a particular state." *Id.* at 769. Thus, the geographical limitation on duties, imposts and excises was construed as having the same purpose as the requirement that direct taxes be apportioned—"the protection of the states, to prevent their being called upon to contribute more than was deemed their due share of the burden." *Id.* at 766.

The purpose of the Uniformity Clause was again examined in *Downes v. Bidwell*, 182 U.S. 244, 278, 21 S.Ct. 770, 783 (1901), where the Court stated:

> In determining the meaning of the words of Article 1, section 8, "uniform throughout the United States," we are bound to consider [all clauses using that phrase]....*The object of all of these was to protect the States which united in forming the Constitution from discriminations by Congress, which would operate unfairly or injuriously upon some States and not equally upon others.* (Emphasis added.)

*See also Hylton v. United States,* 3 U.S. (3 Dall.) 171, 180 (1796) (articles taxed in one state should be taxed in another; in this way, the spirit of jealousy is appeased, and tranquility preserved).

It is difficult to conceive of a non-uniform tax that would not "operate unfairly or injuriously upon some states and not equally upon others." In any event, the Windfall Profit Tax certainly does. As the *amicus* brief of Atlantic Richfield Company effectively shows, the exemption for certain Alaskan oil was intended to and has succeeded in encouraging the production of that oil. Millions of dollars have been invested to acquire, explore and develop Alaskan reserves, all in reliance on the Alaskan exemption. *See* Brief *Amicus Curiae* of Atlantic Richfield Company at 1-3. At the same time, the tax clearly discourages investment in the exploration and production of reserves in non-exempt areas because it decreases the available profit margin. In addition to the diversion of much needed investment funds from States whose oil production is not exempt from the tax, the resulting decrease in production will have a disastrous effect on the economy of those States which rely heavily on income from severance taxes, since the decreased production will result in diminishing severance tax receipts. The industry and economy of Alaska are thus built up to the injury of the other States. As Justice Story pointed out, this is precisely the result which the Uniformity Clause was intended to prevent.

The government concedes that the Windfall Profit Tax Act discriminates in favor of Alaska and against the remaining 49 States, but it argues that something more than mere discrimination is needed for the policy underlying the Uniformity Clause to be violated. Thus, the govern-

ment suggests that in addition to being discriminatory, the tax must have been the result of a "combination" of "substantial" or "broad-based" Congressional majorities and that it must strike at the "vital interests" of a particular region. The government further refines its narrow view of the purpose of the clause by suggesting that the clause was only intended to prevent these combinations from granting an undue preference to their own states or imposing an oppressive discrimination against a minority. Brief for the United States at 27.

A review of the authorities discussed above, however, reveals that the purpose of the uniformity requirement was not limited in any of the ways suggested by the government. While Justice Story gives numerous examples of ways in which various combinations of States might have abused the federal taxing power absent the restraint of the Uniformity Clause, he does not suggest that these were the only dangers that were perceived or intended to be precluded by the absolute requirement of uniformity. Rather, he points out that the intent was to preclude *all* undue preference of *one* state over another, not merely those imposed by a majority on a minority, or those imposed by a "combination" that would strike at the "vital interts" of a particular region. He further points out that this purpose was to be accomplished, and "the grossest and most oppressive inequalities" avoided, by requiring that indirect taxes be uniform throughout the United States.[12]

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[12] Certainly, as the government points out, North Carolina had reason to be pleased with the protection afforded it by the adoption of the clause. *See* C. Warren, The Making of the Constitution, 726-27 (2d ed. 1937). That North Carolina may have feared oppressive combinations among large states with ports and substantial shipping interests, however, does not show an intent to limit the protection of the clause to any particular type of combination. Indeed, Justice Story points out

Thus, all of the authorities agree that the Uniformity Clause was intended to prevent even the possibility of discrimination between States, and that the method chosen to effectuate this intent was to impose an absolute, unqualified requirement of geographic uniformity. Because the Windfall Profit Tax Act does not satisfy this requirement, it violates the literal terms of the Uniformity Clause. Because the act discriminates in favor of Alaska and against the remaining 49 States, it violates the underlying purpose of the clause as well.

As a corollary to its suggestion that the purpose of the Uniformity Clause was limited to preventing a combination of States from granting an undue preference to their own States or to impose an oppressive discrimination against a minority, the government suggests that the purpose of the clause is not violated if Congress has a rational justification for the preference granted or the discrimination imposed. While there is no support for this proposition in the legislative history of the clause, it is interesting to note that the justifications suggested here—a desire to accommodate special circumstances purportedly confined to a limited geographic area and a desire to distribute the tax burden more equitably among the States—are particularly inappropriate since the drafters of the clause specifically rejected considerations of intrinsic equality such as these when they chose to adopt a strictly geographic standard for uniformity.

In view of the drafters' intent not to require intrinsic but only geographic uniformity, the courts have consistently held that an intrinsically non-uniform tax is

(Footnote 12 continued)
that absent the uniformity requirement, any number of different combinations might have been formed for any number of purposes.

constitutional so long as it is geographically uniform. for this Court now to hold that a desire to achieve intrinsic uniformity can render a geographically non-uniform tax constitutional would be either to replace the intended geographic uniformity test with a diluted intrinsic equality test, or it would be to effectively read the Uniformity Clause out of the Constitution. If intrinsic non-uniformity is justified by geographic uniformity and if geographic non-uniformity can be justified by a desire to achieve intrinsic uniformity, what, if anything, would be prohibited?

The only conclusion to be drawn from the history of the clause and its construction by the courts is that a lack of geographic uniformity cannot be justified by an attempt to accommodate particular local conditions or to distribute the tax burden more equitably among the states. As the Court said in *Florida v. Mellon,* 273 U.S. 12, 47 S.Ct. 265, 266 (1927):

> Congress cannot accommodate its legislation to the conflicting or dissimilar laws of the several states nor control the diverse conditions to be found in the various states which necessarily work unlike results from the enforcement of the same tax.

Indeed, since the courts have consistently held that geographic application is the *only* relevant factor in determining whether the Uniformity Clause has been violated, the conclusion is inescapable that there are *no* considerations that can justify a lack of geographic uniformity.[13]

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[13] This conclusion is confirmed by the Court's decision in *Downes v. Bidwell,* 182 U.S. 244, 21 S.Ct. 770 (1901). As was noted above, a majority of the Court held that the import duty there at issue did not violate the Uniformity Clause because the clause was held inapplicable to territories such as Puerto Rico. *See supra* at 12. Justice Harlan would

Just recently, a majority of the Court rejected arguments that a geographically non-uniform bankruptcy law could be constitutional if justified by an identified national interest apart from the economic interests of particular debtors. In *Railway Labor Executives Ass'n v. Gibbons, supra*, the majority looked only to the geographical application of the challenged statute. Since the law was not geographically uniform, it was held unconstitutional without further inquiry.

The suggestion that justifications, particularly justifications aimed at creating intrinsic uniformity, can render a geographically non-uniform tax constitutional must be rejected in this case as well. However justified, the discrimination inherent in the Windfall Profit Tax Act is precisely the evil that the Uniformity Clause was intended

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(Footnote 13 continued)
have held the Uniformity Clause applicable, and in his dissent, he commented as follows regarding the argument that despite the act's non-uniformity, it could survive constitutional scrutiny because of the suggested justification that concessions should be made to accommodate the assimilation of territories:

> *The authority to make such concessions implies the existence in Congress of power to declare that constitutional provisions may be ignored under special or embarrassing circumstances. No such dispensing power exists in any branch of our Government.* The Constitution is supreme over every foot of territory, wherever situated, under the jurisdiction of the United States, and its full operation cannot be stayed by any branch of the Government in order to meet what some may suppose to be extraordinary emergencies.... We cannot violate the Constitution in order to serve particular interests in our own or in foreign lands.

182 U.S. at 384, 21 S.Ct. at 824. (Emphasis added.) The majority as well at least implicitly rejected the argument that special circumstances could justify a violation of the Uniformity Clause when it observed that the duty would have been unconstitutional but for its finding that Puerto Rico was not part of the United States for purposes of the Uniformity Clause. *See supra* at 12.

to prevent. Thus, the act not only violates the literal terms of the clause, but it violates the spirit of the clause as well.

**II. The Unconstitutionality of the Act Cannot Be Cured by Severing the Alaskan Exemption.**

As is fully shown above, the Windfall Profit Tax Act violates the United States Constitution because it is not geographically uniform. The next question presented by the government is whether the Court can cure the constitutional defect under the doctrine of severance, or whether the Court must declare the act unconstitutional, leaving it to Congress to rewrite the act in a manner that comports with constitutional requirements. Actually, the government has presented quite a number of severability questions.

The thrust of the government's argument is that the unconstitutionality of the act can be cured by the simple expedient of severing the sections which create the exemption for certain Alaskan oil. Brief for the United States at 43-44. Nevertheless, although the government points out that these sections encompass federal offshore territories and enormous reserves that Congress *could* constitutionally exempt from the tax, *id.* at 20-21 n.27, 32-33 n.33, its severability argument ignores the subsidiary question of whether the unconstitutional differentiation between Alaska and other States can be severed from the constitutional differentiation between the federal outer continental shelf and the rest of the United States. Additionally, the government's suggested alternative remedies raise the question of whether the Court can apply the doctrine of severability either to extend the exemption to production in all areas similar to the Arctic Circle or areas located more than 75 miles from a pipeline connection, *see* R.

at 737 (Reply Brief for the Defendant United States of America and in Opposition to Motions for Summary Judgment),[14] or to extend the exemption to all newly discovered oil, Brief for the United States at 50 n.46. Finally, the government raises but does not discuss the question of whether Title I of the act can be severed from the remaining titles. Brief for the United States at 47 n.43.[15]

While the government may be correct in suggesting that the District Court engaged in judicial legislation by refusing to enforce the Windfall Profit Tax Act, Brief for the United States at 48, the prohibition against judicial legislation has never been viewed as being a bar to the exercise of a court's power to declare statutes unconstitutional. Similarly, the prohibition against judicial legislation has not been held to preclude a court from declaring a particular portion of a statute unconstitutional while enforcing the remainder, provided the requirements for severability are met.

Nevertheless, only one of the remedial alternatives in this case involves the doctrine of severability in its traditional sense. Since the Windfall Profit Tax Act (Title I of Pub.L. No. 96-223) is unconstitutionally non-uniform, the

[14] Perhaps because it is impossible to identify what areas would be included, *see supra* at 23, the government has now apparently abandoned its argument that this would be an appropriate judicial remedy.

[15] In answering these questions, it is fundamentally important to remember the general principle that a court may not exercise legislative functions to save a law from conflict with a constitutional limitation. As this Court recognized in *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 46 S.Ct. 619, 623 (1926), "amendment cannot be substituted for construction." Indeed, even economic exigencies cannot justify the judicial revision of statutes. *See, e.g.*, Hill v. Tennessee Valley Authority, 549 F.2d 1064, 1074 (6th Cir. 1977), *aff'd*, 437 U.S. 153, 98 S.Ct. 2279 (1978); West Virginia Division of Izaak Walton League of America, Inc. v. Butz, 522 F.2d 945, 955 (4th Cir. 1975).

question arises whether that title is severable from the remaining titles of the statute. As the government points out:

> "The cardinal principle of statutory construction is to save and not to destroy."...The invalid portions of a statute are to be severed "[u]nless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not."

Brief for the United States at 44 (Citations omitted).[16] Notwithstanding the government's assertion in footnote 43 of its brief that it is "questionable whether Congress would have intended to confer the benefits of the energy conservation and production measures provided by Title II of the Act, the low-income energy assistance provided for by Title III or, indeed, possibly any of the relief measures provided by Title IV of the Act, if the revenues generated by Title I would not be forthcoming," there has been no showing that Congress would not have enacted these completely separate titles of P.L. No. 96-223 absent the title which imposed the windfall profit tax. There is therefore no basis for the Court to declare the entire statute invalid.

The next question—whether all or part of the provisions which create the Alaskan exemption should be severed from the provisions which impose the tax—is really a question of available remedies rather than severance in its traditional sense. Although the invalidity of the act results from the coexistence of the exemption provisions with the taxing provisions, the exemption provisions are

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[16] *See also* Zobel v. Williams, __ U.S. __, 102 S.Ct. 2309 (1982); 2 Sutherland Statutory Construction § 44.04 (4th ed. C. Sands 1973), hereinafter cited as "Sutherland § __").

not invalid in and of themselves. The question, therefore, is not whether invalid provisions should be severed, but rather whether the Court can cure the unconstitutionality of the act by severance.

At first blush, it would seen that the decisions of this Court extending the traditional doctrine of severance to cure the unconstitutionality of underinclusive statutes by according benefits to the excluded class would support the applicability of the doctrine of severability in this case as well. It is now fairly well recognized that "[w]here a statute is defective because of underinclusion there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend coverage of the statute to include those who are aggrieved by exclusion." *Welsh v. United States,* 398 U.S. 333, 361, 90 S.Ct. 1792, 1807-08 (1970) (Harland, J., concurring). The doctrine of severability has been extended to authorize this latter alternative, despite the fact that "the necessary remedial operation, extension, is more analogous to a graft than amputation." 398 U.S. at 364, 90 S.Ct. at 1809.

Nevertheless, the extension of the doctrine of severability to allow the benefits of a statute to be accorded to a plaintiff who was unconstitutionally excluded is fundamentally different from the extension of the doctrine to take away a benefit that was expressly intended by Congress to be given. A specific declaration of intent to benefit some does not necessarily indicate an intent not to extend the benefit to others; nevertheless, it does by its terms expressly state an intent that the benefit given should not be taken away. Additionally, to extend a benefit to a plaintiff gives him a remedy; whereas to remove the benefit from another leaves the plaintiff remediless. Perhaps for these

reasons, there are numerous cases where the unconstitutionality of a statute has been cured under the doctrine of severance by extending benefits to the excluded class,[17] yet one searches in vain for a case where an exemption has been severed so as to extend a burden.[18]

An even more important distinction, however, is that this Court has recognized that the power to order an extension of *benefits* is not clearly beyond the constitutional competence of a federal court. *Califano v. Westcott*, 443 U.S. 76, 91, 99 S.Ct. 2655, 2664 (1979). Conversely, the Court has not recognized its power to extend a burden. While it might be argued that the extension of *any burden* is a legislative function beyond the competence of the judiciary, certainly the extension of *taxes* is such a function.

The Constitution grants the power of taxation exclusively to the legislative branch of government. U.S. Const. Art. I, § 7, cl. 1. Thus, in *Helvering v. Griffiths*, 318 U.S. 371, 404, 63 S.Ct. 636, 653 (1943), the Court refused to enforce a federal income tax statute that provided for the

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[17] *E.g.*, National Life Ins. Co. v. United States, 277 U.S. 508, 48 S.Ct. 591 (1928); Welsh v. United States, 398 U.S. 333, 90 S.Ct. 1792 (1970); Califano v. Wescott, 443 U.S. 76, 99 S.Ct. 2655 (1979); Moritz v. Comm'r of Internal Revenue, 469 F.2d 466 (10th Cir. 1972); *cf.* Iowa-Des Moines National Bank v. Bennet, 284 U.S. 239, 52 S.Ct. 133 (1931).

[18] Perhaps for a lack of any better authority, the government relies heavily on a passage from this Court's decision in *Utah Power & Light Co. v. Pfost*, 286 U.S. 165, 52 S.Ct. 548 (1932), where the Court suggested that the severance of an exemption contained in a state statute, the primary object of which was to raise revenue, might best effectuate the legislature's intent. Nevertheless, since the Court found that the exemption did not render the statute unconstitutional, the suggestion was clearly dicta. In any event, as will be shown more fully below, the primary objective of the Windfall Profit Tax Act was not merely to raise revenues but to achieve an appropriate balance between raising revenues and encouraging domestic oil production. Legislative intent here will best be effected by *not* severing the exemption. *See infra* at 42-46.

taxation of stock dividends but only to the extent such dividends constituted income under the Sixteenth Amendment to the Constitution, stating: "We are unable to find that Congress intended to tax the dividends in question, and without congressional authority *we are powerless to do so.*" (Emphasis added). If the Court is powerless to impose a tax where the legislative intent to tax is equivocal, it certainly is powerless to impose a tax where the legislative intent is expressly and unequivocally *not* to tax.

This limitation on the Court's power was recognized in *Davis v. Wallace*, 257 U.S. 478, 42 S.Ct. 164 (1922), where the Court agreed with the plaintiffs that North Dakota's special excise tax could not be assessed against them on the basis of the general computation scheme after the excepting provision that governed computation of the tax as to them had been declared unconstitutional. The Court reasoned:

> Here the excepting provision was in the statute when it was enacted, and there can be no doubt that the legislature intended that the meaning of the other provisions should be taken as restricted accordingly. Only with that restricted meaning did they receive the legislative sanction which was essential to make them part of the statute law of the State; and no other authority is competent to give them a larger application.

257 U.S. at 484-85, 42 S.Ct. at 166.

Perhaps more particularly on point is the Court's observation in *Frost v. Corporation Commission of Oklahoma*, 278 U.S. 515, 525, 49 S.Ct. 235, 239 (1929), that if the statute there under consideration had contemporaneously exempted certain corporations from the require-

ments imposed, the invalid exemption could not be severed. The Court reasoned that "to hold otherwise would be to extend the scope of the law in that regard so as to embrace corporations which the legislature passing the statute had, by its very terms, expressly excluded." In this case, as well, to judicially excise the Alaskan exemption would be to ignore the expressly declared intent of Congress that oil produced in the exempt area should not be taxed.

The wisdom of not allowing tax burdens to be extended by judicial decree under the guise of severance is illustrated by this very case. As will be discussed more fully below, a number of critical policy considerations were involved in deciding what crude oil should be taxed and to what degree. The decision not to tax certain Alaskan oil was reached only after a thorough examination of the policy implications of such a decision. This is a legislative function which should be left to Congress. Indeed, the Constitution requires that it be left to Congress.

Even if there were no constitutional impediment to extending the windfall profit tax to some or all presently exempt areas, however, the doctrine of severance would not authorize such a result. As was noted above, severance is permissible only if the legislature would have enacted the provisions within its power independently of those which are not. *See supra* at 37. In this case, every indication points to the conclusion that Congress would not have enacted the Windfall Profit Tax Act in its present form absent the exemption.

One indicia of legislative intent regarding severance is whether the invalid portion of the statute is in a separate provision capable of being excised. Thus, in *Sloan v. Lemon*,

413 U.S. 825, 834, 93 S.Ct. 2982, 2987-88 (1973), the Court refused to sever unconstitutional aid to sectarian schools from constitutional aid to nonsectarian schools because "to approve such a distinction here would be to create a program quite different from the one the legislature actually adopted." Even more recently in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, __ U.S. __, 102 S.Ct. 2858, 2880 n.40 (1982), the Court refused to sever the unconstitutional grant to bankruptcy courts of jurisdiction over state law claims from the constitutional grant of jurisdiction over other claims, in part because the statute itself did not draw these distinctions but rather contained only a single statutory grant of jurisdiction.

These cases could tend to support an argument that if the exemption for Alaska is to be invalidated, the exemption for the outer continental shelf above the Arctic Circle should be invalidated as well. Nevertheless, such an argument is refuted by a second recognized indicia of congressional intent regarding severance—whether severance would defeat a dominant purpose of the act. In view of the legislative history showing that the dominant purpose of the act was to strike an appropriate balance between raising revenue and encouraging domestic oil production, it is clear that Congress would have wanted to retain as much of the exemption as was in its constitutional power to grant. More importantly, this same legislative history conclusively establishes that had Congress known that even some of the exemption would have been invalidated, the act in its present form would never have been passed. As was noted above, this is the ultimate test for severability.

Although in its most recent brief the government emphasizes the revenue-raising aspects of the Windfall Profit Tax Act, in the past it has equally emphasized the

importance of the act's production incentives.[19] Indeed, in its brief filed with the District Court in support of its Motion for Summary Judgment, the government effectively showed that the dominant purpose of the act was not merely to raise revenue, but rather that it was to strike an appropriate balance between the competing objectives of raising revenue and encouraging production, and that this balance was arrived at only after extensive negotiations and compromise. R. at 656.

Undoubtedly, the classifications and exemptions contained in the act were an integral part of the balance that was achieved. In its earlier brief to the District Court, the government concluded that "a careful review of the Act and its legislative history reveals that Congress made an exhaustive examination of relevant economic circumstances in the course of determining upon what oil production the tax would be levied and to what degree," R. at 657, and that "Congress devoted a great deal of effort and debate to devise a way to make certain that the contemplated excise tax would not act as a disincentive to oil production," *id.* at 661. Even in its most recent brief, the government acknowledges that "[w]hile the pattern of classifications and exemptions was modified in certain respects as the proposed legislation was considered by the House and the Senate, the *primary objective* remained 'to impose relatively high tax rates where production cannot be expected to respond very much to further increases in price and relatively low tax rates on oil whose production

[19] Even in its most recent brief, the government stresses the fact that the act was enacted as an integral part of a broader national energy program which was intended to encourage the exploration and production of oil, eliminate the inequalities and inefficiencies of the price control system, reduce the United States' dependency on foreign oil, and reduce the adverse balance of payments attributable to the importation of oil. Brief for the United States at 12, 14.

is likely to be responsive to price.' " Brief for the United States at 15. (Emphasis added.)

The Alaskan exemption in particular was considered to be a critical part of the balance. It is clear from the government's discussion of the act's legislative history that none of the seriously considered versions of the tax bill would have imposed a tax on oil produced from the presently exempt areas. *See* Brief for the United States at 15-20. It is equally clear that the reason for this consistent treatment of "exempt Alaskan oil" was the concern that taxation would discourage exploration and production of that oil. *Id.*

The importance of Alaska as an oil producing State was frequently emphasized. *See, e.g.,* 126 Cong. Rec. S 1842-3 (daily ed. March 13, 1980) (remarks of Rep. Young); 125 Cong. Rec. S 17666 (daily ed. Dec. 3, 1979) (remarks of Sen. Stevens). In general, Congress believed that there was a tremendous amount of oil yet to be produced in Alaska and that this oil should be exempt from the tax. *See* 125 Cong. Rec. S 18137 (daily ed. Dec. 10, 1979) (remarks of Sen. Long). The proven, but as yet undeveloped, Alaskan reserves were seen as constituting "probably the most promising province remaining in this country for developing domestic petroleum supplies." 126 Cong. Rec. S 2772 (daily ed. March 20, 1980) (remarks of Sen. Bellmon). The discovered, but as yet unproven reserves in the Kuparuk and Lisburne formations were also the subject of discussion. 125 Cong. Rec. S 17715 (daily ed. Dec. 4, 1979) (remarks of Sen. Bradley). And, as the government itself points out, the exempt reserves in the federal outer continental shelf may be even more substantial. Brief for the United States at 21 n.28.

The Joint Explanatory Statement of the Committee of Conference, which was the result of the compromise between the House and Senate delegates, illustrates the concern by Congress that these important oil producing regions would not be developed unless they were exempt from the tax:

> The exemption of Alaskan oil production for the designated locations reflects the concern of the conferees that taxation of this production would discourage exploration and development of reservoirs in areas of extreme climatic conditions.

H. Conf. Rep. No. 96-817, 96th Cong., 2d sess. 103, *reprinted in* [1980] U.S. Code Cong. & Ad. News, 642, 656. As the government itself previously pointed out: "The exemption of a portion of Alaskan oil production merely emphasizes the concern of Congress that imposition of the tax on certain Alaskan production would make it less likely that the state's resources would be developed fully." R. at 661. The government's discussion further shows that Congress carefully considered alternatives to the Alaskan exemption which would have promoted the act's purpose by encouraging domestic oil production, but that these alternatives were rejected. *Id.*

The Alaskan exemption was clearly a carefully considered component of the balance that was painstakingly struck between the competing objectives of raising revenues and encouraging domestic production. To judicially excise the exemption would destroy this balance, with the result that raising revenues would be overemphasized to the detriment of encouraging production. Under these circumstances, and particularly in view of the fact that none of the seriously considered versions of the

tax bill would have taxed the exempted area, it certainly cannot be said that Congress would have passed the act in its present form absent the Alaskan exemption.

In contrast to the wealth of legislative history which supports the conclusion that Congress did not intend for the Alaskan exemption to be severable from the remainder of the act, the government can point to only one statement which purportedly establishes that Congress intended the contrary—a statement by Senator Long that the general severability clause contained in the Internal Revenue Code would be applicable, so that if the courts should find a constitutional objection valid with respect to the Alaskan oil exemption, the exemption would be severed. Brief for the United States at 46.

The severability clause referred to by Senator Long provides that "[i]f any provision of this title...is held invalid, the remainder of the title...shall not be affected thereby." I.R.C. § 7852(a). Senator Long's interpretation of this clause notwithstanding,[20] it is highly questionable whether the clause should be construed to apply where the issue is the severability of one portion of a particular act from the remainder of that act. The intent of the clause was clearly to preserve existing provisions of "the title," meaning Title 26, which contains the entire Code. Obviously, it would be extremely unwieldly and undesirable if a constitutional flaw in a later appended tax statute could result in nullification of the entire Code. Whether or not the individual provisions of a later appended tax statute are

[20] As this Court recently reiterated, the views of some Congressmen as to the construction of a statute adopted years before by another Congress have " 'very little, if any, significance.' " *United States v. Clark*, 445 U.S. 23, 33 n.9, 100 S.Ct. 895, 902 (1980). (Citations omitted.)

severable from that statute, however, is simply not addressed.

Nevertheless, even if the Court were to hold that the general severability clause of the Code is applicable here, the clause would not require that the Court sever the Alaskan exemption rather than declare the entire act unconstitutional. A severability clause is merely an aid in determining legislative intent, not an inexorable command. *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330, 362, 55 S.Ct. 758, 767 (1935). The key remains legislative intent.[21]

The presence of even a particularized severability clause does not permit the court to alter a statute in a way that would defeat the statute's dominant purpose. As the Supreme Court stated in *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330, 362, 55 S.Ct. 758, 768 (1935): "[N]otwithstanding the presumption in favor of divisibility which arises from the legislative declaration, we cannot rewrite a statute and give it an effect altogether different from that sought by the measure viewed as a whole." There, the Court struck down the entire Railroad Retirement Act rather than sever provisions which were found to be necessary for the accomplishment of the act's

[21] Where, as here, the severability clause relied on is a general severability clause in a pre-existing statute, its aid in determining legislative intent is very much weakened. As was pointed out in *Sutherland* § 44.11, p. 356:

> [I]t is a reasonable inference that because a general act cannot control subsequent legislative intent and therefore is questionable evidence of it, less weight may attach to such a general rule of separability than to the clause in a separate act.

dominant purpose, the establishment of a compulsory pension system.[22]

Thus, the primary consideration in every case, including cases involving a statute that contains a severability clause, is legislative intent; and this intent takes precedence over any presumption created by the existence of a severability clause. In the case of the Windfall Profit Tax Act, the legislative history clearly shows that Congress would not have been satisfied with the act had it not included the Alaskan exemption.

To the extent that the government relies on Senator Long's statement as being proof of a contrary intent, the reliance is misplaced. That Senator Long may have intended the Alaskan exemption to be severable is by no means indicative of the intent of the entire Congress. *See American Smelting and Refining Co. v. Occupational Safety and Health Review Comm'n*, 501 F.2d 504, 509 (8th Cir. 1974). And as this Court has recently reiterated on several occasions, the remarks of a single legislator, even the sponsor, are certainly not controlling in analyzing legislative history. *See, e.g., Weinberger v. Rossi*, __ U.S. __, 102 S.Ct. 1510, 1517 n.15 (1982); *Chrysler Corp. v. Brown*, 441 U.S. 281, 311, 99 S.Ct. 1705, 1722 (1979).

In any event, while speaking in conclusory terms about intending the Alaskan exemption to be severable, Senator Long virtually admitted that Congress would not be satisfied with the act if the exemption were severed. He notes that as a result of severance, Alaska would pay the

[22] *See also* McGinnis v. Royster, 410 U.S. 263, 277, 93 S.Ct. 1055, 1063 (1973) (the removal of even a "subordinate" purpose may shift altogether the consensus of legislative judgment supporting the statute).

same 30 percent tax as everybody else, but states "if that were to be the case we would expect to act in the future to remedy this and to try to provide some consideration based on the cost of transportation and the high cost of developing oil and producing oil in those areas north of the Arctic Circle, and those areas that are far removed from a pipeline or any kind of a feasible water transportation." 126 Cong. Rec. S 3056 (daily ed. March 26, 1980) (remarks of Sen. Long). Thus, the legislative history of the Windfall Profit Tax Act, including the statements of Senator Long, fully supports the conclusion that the act would not have been passed in its present form absent the exemption for certain Alaskan oil.

The government has suggested as alternative remedies that the Court should extend the exemption to all newly discovered oil or to all areas similar to those presently exempt. *See* Brief for the United States at 50-51 n.46, Record at 727. Nevertheless, the Court must decline the government's invitation to rewrite the act in either of these respects. Even in those cases where some modification of a statute has been allowed under the doctrine of severance so as to extend a benefit to an unconstitutionally excluded class, the Court has recognized that where novel terms would have to be introduced into the statutory scheme, the definitional and policy questions involved should best be left to Congress. *Califano v. Westcott*, 443 U.S. 76, 92, 99 S.Ct. 2655, 2665 (1979). *Cf. Buckley v. Valeo*, 242 U.S. 1, 143, 96 S.Ct. 612, 693 (1976); *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, __ U.S. __, 102 S.Ct. 2858, 2880 n.40 (1982).

Thus, the only appropriate remedy in this case is to declare the Windfall Profit Tax invalid in its entirety. This will permit Congress to reevaluate the statute and create a new legislative basis to achieve its goals of encouraging

domestic production and raising tax revenues, while at the same time complying with the constitutional requirement that excise taxes be geographically uniform throughout the United States. The economic aspects of striking the entire statute need not be severe if Congress acts quickly to pass a constitutional program. On the other hand, failure to develop oil production in Alaska to its full potential—the result Congress wished to avoid—may have long-range consequences for the nation's overall energy goals.

## CONCLUSION

Title I of the Crude Oil Windfall Profit Tax Act of 1980 is clearly unconstitutional because it imposes an excise that is not geographically uniform throughout the United States. The only remedy in this case that will avoid impermissible judicial legislation is for the Court to declare the act invalid. Particularly in view of the legislative history which shows that Congress would not have passed the act in its present form absent the exemption, Congress, not the Court, should be entrusted with the task of restructuring the act to conform to the requirements of the Uniformity Clause in the way that will best effectuate its purpose of designing a tax that strikes the appropriate balance between raising revenues and increasing domestic production.

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NO. 82-1066

# IN THE SUPREME COURT OF THE UNITED STATES
## OCTOBER TERM, 1982

**UNITED STATES OF AMERICA,** *Appellant*

**V.**

**HARRY PTASYNSKI,** *et al., Appellees*

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING**

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## QUESTIONS PRESENTED

1. Whether the exclusion of geographically defined categories of Alaska oil from the coverage of Title I of the Crude Oil Windfall Profit Tax Act of 1980 violates the Uniformity Clause of the Constitution, which requires that "Duties, Imposts and Excises shall be uniform throughout the United States."

2. Assuming the answer to Question No. 1 is in the affirmative, whether the proper remedy is to strike Title I in its entirety or to sever the invalid exemption, thereby extending the windfall profit tax to all Alaskan oil.

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NO. 82-1066

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

UNITED STATES OF AMERICA, *Appellant*

V.

HARRY PTASYNSKI, *et al., Appellees*

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF WYOMING

# BRIEF FOR THE STATE OF TEXAS, APPELLEE

## STATEMENT OF THE CASE

This case concerns a challenge to the validity of Title I of the Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223 (hereinafter the "Act"), on grounds that Sections 4991(b)(3) and 4994(e), which exempt from the tax all crude oil produced north of the Arctic Circle or north of the Alaska-Aleutian Divide and 75 miles or more from the Trans-Alaska Pipeline System, violate article 1, section 8, clause 1 of the Constitution (hereinafter the "Uniformity Clause"). The State of Texas has no objection to the explanation of the Act contained in the Statement section of the Brief for the United States. Like the State of Louisiana, however, Texas notes that the federal government's description of the proceedings below de-emphasizes the intervention of the two states.

A more complete explanation of the procedural posture of the States of Texas and Louisiana is presented in the Statement section of the Brief for Louisiana.

## SUMMARY OF ARGUMENT

Since the time prior to adoption of the Constitution, the phrase "uniform throughout the United States" as used in the Uniformity Clause has referred strictly to geographical uniformity. That the clause required geographic uniformity only was a ground for complaint at the Constitutional Convention, where it was argued that the uniformity requirement should limit Congress to taxation which was equal in its operation on the several states. *Knowlton v. Moore*, 178 U.S. 41 (1900) (hereinafter "*Knowlton*"). Recognizing that such a restriction would render the grant of taxing power meaningless, the framers of the Constitution rejected the argument advocating such "intrinsic" uniformity. Id. at 108-9.

The purpose of the Uniformity Clause and its requirement of strict geographic uniformity was to prevent discrimination by Congress among the states. Id. at 89; *Downes v. Bidwell*, 182 U.S. 244 (1901). On its face, the Act does not comply with the geographic uniformity requirement of the clause because it makes oil production, the subject of the tax, taxable when it is located in Texas but non-taxable when it is located in portions of Alaska, to the great benefit of Alaska.

The "rational considerations" urged by the federal government as justifying a departure from the rule of strict geographic uniformity deal with intrinsic uniformity, which the authors of the Constitution and the justices of this Court have rejected. There are no universal objects whose taxation would produce an equal effect in every state. Thus, to allow considerations other

than geographic uniformity in applying the Uniformity Clause would, at a minimum, give to Congress the difficult task of weighing the competing interests of the different states as regards the indirect taxes to be imposed on them. The legislative process would be opened to competing groups of states attempting to escape the indirect taxation of favored industries, and the "spirit of jealousy" which the Constitution's framers sought to appease by inclusion of the Uniformity Clause, *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 180 (1796), would be encouraged.

Unlike the geographical uniformity requirement of the Uniformity Clause, the uniformity limitation of the Bankruptcy Clause is inherently flexible. See *Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Railway Co.*, 294 U.S. 648, 668 (1935). The purpose of the Bankruptcy Clause was to encourage commerce by stopping the practice of some states of ignoring discharges in bankruptcies obtained in other states. It was, in fact, inserted in the Constitution immediately after the grant of commerce power, and it should be read in light of the Commerce Clause, which is not limited by the requirement of geographic uniformity. Nadelman, *On the Origin of the Bankruptcy Clause*, 1 AM.J.LEGAL HIST. 215, 227 (1957). The Purpose of the Uniformity Clause, on the other hand, was to restrain factionalism among the states. To weaken the restraints imposed by the geographical uniformity requirement by making it more flexible would defeat the purpose of the clause.

The purpose of the Port Preference Clause was similar to that of the Uniformity Clause: to prevent direct discrimination against the ports of one or more states in favor of the ports of another state. *See Pennsylvania v. Wheeling and Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856). If port preference decisions are used to aid in

understanding congressional powers under the Uniformity Clause, they buttress the conclusion that the Alaska exemption is unconstitutional, since the benefit conferred by the Act on Alaska and its discrimination against the State of Texas are both deliberate and direct. That Congress could have conferred this benefit in terms which were not constitutionally infirm is irrelevant. Under the rules of statutory construction, the language of a statute controls when it is sufficiently clear in its context. *Ernst & Ernst v. Hoch Felder*, 425 U.S. 185, 201 (1976); *United States v. Oregon*, 366 U.S. 643, 648 (1961). The language used by Congress to frame the Alaska exemption could not be clearer. The exemption is unlawful.

The general rule for determing whether the unconstitutionality of a statutory provision like the Alaska exemption necessitates the invalidation of the entire act turns on legislative intent. If it is evident from the circumstances surrounding passage of the act that the remainder of the statute would not have been passed in the absence of the invalid sections, the act as a whole must fall. *International Textbook Co. v. Pigg*, 217 U.S. 91, 113 (1910). The legislative history of the Act makes it clear that the remainder of the Act would not have passed in the form finally approved by Congress, had the exempt Alaska oil provision not been included.

Paramount among the concerns of Congress in its consideration of windfall profit tax legislation was the need to reduce dependence on imported crude oil. Members of Congress based their support of the different versions of the windfall profit tax bill on the inclusion of incentives to increase the domestic production necessary to achieve a greater degree of national energy independence. Production incentives were critical to the balance between generating revenue and encouraging domestic exploration and production. The exempt Alaska oil provision was present in every version of the

windfall profit tax legislation and was clearly one of the weightier elements on the incentives side of the balance. Moreover, the Alaska exemption was essential to the compromise which allowed the windfall profit tax bill to progress through the Senate. As a political matter, the taxing provisions would not have survived Senate debate in their present form in the absence of this compromise.

Assuming arguendo that the general separability clause in the Internal Revenue Code, Section 7852(a), applies to the Act, its presence in no way concludes the ultimate decision on severance. A severance clause is "not an inexorable command," *Dorchy v. Kansas*, 264 U.S. 286, 290 (1924), but rather creates a presumption of divisibility which is overcome by considerations showing the inseparability of the statute's provisions or the probability that the legislative body would not have passed the remnant. *Williams v. Standard Oil Co.*, 278 U.S. 235, 242 (1929). Any presumption which Section 7852(a) may raise is overcome by the facts that the Alaska oil exemption was intrinsic to the Act's balance of production incentives against revenue generation, that similar exemptions were present in every version of the legislation, and that the exemption was critical to the political compromise which sustained the legislation's progress through the Senate into conference.

Severance in this case would work a vast extension in the operation of the tax and disrupt the balance deliberately fixed by Congress, thus infringing improperly on the powers and duties of Congress. The fact that the balance involves revenue-raising considerations does not compel preservation of the tax. *See Marchetti v. United States*, 390 U.S. 39 (1968). As a practical matter, only Congress knows how to assess the competing demands of the U.S. treasury and the nation's need for energy independence. As a constitutional matter, only

Congress is empowered to make this assessment. The Constitutional gives Congress the exclusive power to tax, and there is no authority for imposition of any type of tax by the judiciary.

Judicial legislation is particularly inappropriate where, as here, the challenged statute is extraordinarily complex. *See Untied States v. General Douglas MacArthur Senior Village, Inc.*, 470 F.2d 675, 679 (2d Cir. 1972), *cert. denied*, 412 U.S. 922 (1973). Unlike the courts, Congress can choose from a multitude of legislative options for curing the statute's constitutional infirmity, which options will take into consideration policy implications and the statutory complexities in changing the operation of the tax. The remedy for this Act should be left to those who drafted and passed it and whose legitimate range of actions is most flexible.

## ARGUMENT

### I. THE WINDFALL PROFIT TAX VIOLATES THE UNIFORMITY CLAUSE OF THE CONSTITUTION.

The State of Texas has challenged the validity of the Windfall Profit Tax because this excise tax discriminates against Texas and in so doing violates the Uniformity Clause of the Constitution.

This Court has defined the requirement of uniformity that is found in article I, section 8, clause 1 in terms of geographic uniformity. The brief submitted to this Court by the United States evidences either a misunderstanding of what this Court has meant by geographic uniformity or a desire to alter the traditional meaning in order to save an otherwise unconstitutional statute. The interpretation of geographic uniformity that has been applied by this Court in the past is the meaning that the authors of the Constitution intended.

It prevents the type of discrimination that the windfall profit tax now works against Texas.

The most authoritative case on the Uniformity Clause is *Knowlton v. Moore*, 178 U.S. 41 (1900) (hereinafter "*Knowlton*"). An evaluation of the Clause and its interpretation by this Court must begin with an analysis of this case.

**A. This Court's interpretation of geographic uniformity renders the Act unconstitutional.**

In *Knowlton*, the executors of the estate of Edwin F. Knowlton challenged the inheritance tax included in the War Revenue Act of 1898. They argued that the tax was lacking in uniformity because it exempted legacies and distributive shares in personal property in amounts less than $10,000, classified the rate of tax according to the decedent's relationship to the legatee or distributee, and provided for a rate of tax graded according to the amount of the legacy or share. It was contended that the impact of the War Revenue Act was lacking in geographic uniformity and as synonymous with the expression — to operate generally throughout the states.

In rejecting the challenge to the inheritance tax, this Court found that geographic uniformity does not require that the object of the tax must exist with uniformity in the several states. Taxes are uniform in the constitutional sense when they operate generally throughout the United States and uniformly wherever the subjects of the tax are found. The detailed opinion of this Court in *Knowlton* explains that, both prior to the adoption of the Constitution and at the time of the Constitutional Convention, the phrase "uniform throughout the United States" was used "with reference purely to a geographical uniformity and as synonymous with the expression — to operate generally throughout the

United States.'" *Id.* at 96, 98. In drafting the Uniformity Clause, the authors of the Constitution struck out the words "and equal" after the word "uniform" because they wanted to "prevent the implication that the duties, imports, and excises which were to be uniform throughout the Untied States were to be placed upon rights equally existing in the several states." *Id.* at 109. The phrase "and equal" was eliminated so that taxes did not have to have an equal effect in each state in order to be constitutionally uniform. *Id.* at 104.

The use of the words "uniform throughout the United States" as meaning only geographic uniformity is apparent from the proceedings of the Continental Congress. *Id.* at 96. Upon one occasion, the opposition to a proposed tax on imported salt took the form of arguments that the tax would bear injuriously on eastern states because their fisheries used the salt. *Id.* at 99. The belief that uniform indirect taxes would not result in equality of taxation is also illustrated by Rhode Island's opposition to a resolution recommending to the several states that Congress be vested with the power to levy certain taxes upon imported goods. Rhode Island protested against this power on the ground that the taxes would be unequal in their operation, bearing more heavily upon the commercial states, and pressing with greatest severity upon Rhode Island, the state that drew its chief support from commerce. *Id.* at 99-100

That the Uniformity Clause required only geographic uniformity was understood by the Constitutional Convention. When it met in Philadelphia in 1787, it avoided any implication that duties, imposts, and excises were only to be placed upon rights "equally existing" in the several states. *Id.* at 109. Later, those who opposed the ratification of the Constitution knew that the Uniformity Clause imposed only geographic uniformity, and they made this a distinct ground of complaint. *Id.* at 106.

The requirement that indirect taxation be limited to objects "existing in equal quantity in the several states" was rejected by the Convention because it would render the grant of power to tax a failure. *Id.* at 108-9. No such universal objects of taxation were or are in existence in the states. Moreover, the inability of Congress to give equal effect to duties, imports, and excises is well established. As this Court has stated,

> *Congress cannot* accommodate its legislation to the conflicting or dissimilar laws of the several states, nor *control the diverse conditions to be found in the various states, which necessarily work unlike results from the enforcement of the same tax.* All the Constitution (article l, §8, cl. l) requires is that the law shall be uniform in the sense that by its provisions the rule of liability shall be alike in all parts of the United States.

*Florida v. Mellon*, 273 U.S. 12, 17 (1927). (emphasis added).

The indirect taxes that are subject to the Uniformity Clause will always have an unequal effect among the states. This is true whether it is a salt tax which bears heavily on the fisheries of the eastern states, or a tax that burdens the commerce of Rhode Island, or an oil tax which bears heavily on the Alaskan oil industry.

The decisions of this Court after *Knowlton* continued to interpret the Uniformity Clause solely in terms of geographic uniformity. They state that the only rule of uniformity prescribed with respect to duties, imposts, and excises laid by Congress is geographic, or as it is sometimes called, territorial uniformity. *La Belle Iron Works v. United States*, 256 U.S. 377, 392 (1921); *Brushaber v. Union Pacific Railroad Company*, 240 U.S. 1, 24 (1916); *Billings v. United States*, 232 U.S. 261, 282 (1914).

Thus, questions of intrinsic uniformity, which deal with the necessity of taxes having an equal effect in each state, are irrelevant for the purposes of the Uniformity Clause cases. The Brief for the United States erroneously assumes that an alleged attempt by Congress to give taxation an equal effect in all states, such as the exemption from taxation of crude oil production from a geographically designated area of the United States, satisfies the requirement of the Uniformity Clause. Equalizing the effect of taxation has nothing to do with the requirement of geographic uniformity. In *Knowlton*, it was explained that the purpose of the Uniformity Clause and its requirement of geographical uniformity was to prevent discrimination among the states.

> Giving to the term *uniformity* as applied to duties, imposts, and excises *a geographical significance*, likewise *causes that provision to look to the forbidding of discrimination as between the states*, by the levying of duties, imposts, or excises upon a particular subject in one state and a different duty, impost, or excise on the same subject in another. . . .

*Knowlton* at 89. (emphasis added).
The Court concluded that "the possible discrimination against one or more states was the only thing intended to be provided for by the rule which uniformity imposed upon the power to levy duties, imposts and excises." *Id.*

By the terms of the Act, "exempt Alaskan oil," a classification drawn strictly in terms of geography, is relieved from the burden of the windfall profit tax. *See* 26 U.S.C. §§4991(b)(3), 4994(e) (Supp. 1981). As the federal government has emphasized, this exemption was made because of the high exploration, production, and transportation costs in the exempt area. *See* Brief for the United States at 15, 19, 29-30. High exploration, production, and transportation costs are not, however, unique to the geographic area designated by Congress in

the Alaska exemption. Offshore gas production from Texas submerged lands, which yields condensate subject to the windfall profit tax, is much more costly than production from uplands. For example, Atlantic Richfield Company recently announced plans to drill a 23,000 foot test well on Texas submerged lands with estimated dry hole costs of $30 million. If the well is completed, estimated additional costs will be $20 million. *See* Appendix A. Yet Congress did not give Texas a tax exemption for production from submerged lands subject to the State's control. The Act on its face does not comply with geographic uniformity requirements of the Uniformity Clause because it makes oil production, the subject of the tax, taxable when it is located in Texas but non-taxable when it is located in portions of Alaska, to the great benefit of Alaska. If this Court upholds the Alaska exemption, it will be an amazingly short time before the Texas delegation in Congress begins pressing for comparable geographic exemptions for Texas production.

The basic error in the argument of the United States is that it ignores the fact that the Uniformity Clause deals solely with geographic uniformity, which concerns discrimination by Congress against one or more states. In its brief, the United States argues that the exclusion from taxation of production from certain geographically defined areas in Alaska and on the Outer Continental Shelf is not a violation of the geographic uniformity requirement of the clause because the exclusions are supported by a "rational basis" or "rational considerations" or "reasonable grounds." Brief for the United States at 27, 31, 32, 33. Such considerations have nothing to do with geographic uniformity. They deal with "intrinsic" uniformity which concerns the equal effect of taxes in each state. They are issues that are irrelevant in Uniformity Clause litigation.

To take into consideration any factors besides geographic uniformity is to invite disaster. Since there are no universal objects whose taxation would produce an equal effect in all fifty states, Congress would have to embark on the very difficult task of weighing the competing interests of the various states as regards the indirect taxes to be imposed on them. Thus, if Congress were to attempt to equalize the effect of oil excise taxes in Texas and Alaska, it would have to find some way to analyze the extra costs of the gas production off the Texas coast, which yields taxable condensate, and then measure those costs against the expenditures required in the area subject to the Alaska exemption. Similar analysis would have to be done in other geographic areas of the nation. This is precisely the type of task which would be required if Congress is permitted, as the federal government urges, to enact exceptions supported by a "rational basis" or "rational considerations" or "reasonable grounds." Brief for the United States at 27, 31, 32, 33.

The federal government argues that geographic uniformity has not been violated because "substantial congressional majorities (including members from oil producing states) recognized and chose to accommodate the special circumstances confined to a limited geographic area within one state." Brief for the United States at 9. It should be remembered that the Uniformity Clause "look[s] to the forbidding of discrimination as between the states." *Knowlton* at 89. Furthermore, in *Downes v. Bidwell*, 182 U.S. 244 (1901), this Court explained that the purpose of the Uniformity Clause "was to protect the states which united in forming the Constitution from discriminations by *Congress*, which would operate unfairly or injuriously upon some states and not equally upon others." *Id.* at 278 (emphasis added). It matters not whether the geographic discrimination is made by congressional majorities in favor of a minority. It is any discrimination made by Congress on a geographic basis which is prohibited.

The argument of the United States assumes that once the barrier of geographic uniformity has been removed, the majorities in Congress will always act selflessly in the best interests of the country. This argument assumes that no bargains will be struck and that there will be no discrimination among the states as various industries and interest groups attempt to elude the burden placed on them by indirect taxes. As can be seen from the discussion of the origin of the Uniformity Clause that is found in *Knowlton*, the authors of the Constitution had some doubts about the selflessness of the members of Congress and their ability to always refrain from favoring some states at the expense of others. When this Court first had the opportunity to consider the Uniformity Clause, it noted that if apportionment was the standard that had to be applied, the result would be:

> . . . intricate and endless valuations and assessments, in which everything will be arbitrary, and nothing certain. There will be no rule to walk by. The rule of uniformity, on the contrary, implies certainty, and leaves nothing to the will and pleasure of the assessor. In such a case, the object and the sum coincide, the rule and the thing unite, and of course there can be no imposition. The truth is that the articles taxed in one state should be taxed in another; in this way the spirit of jealousy is appeased, and tranquility preserved. . . .

*Hylton v. United States*, 3 U.S. (3 Dall.) 171, 180 (1796).

In addition to the fact that the elimination of geographic uniformity would expose the nation to the spectacle of competing groups of states attempting to escape the indirect taxation of favored industries, as a practical matter, destruction of geographic uniformity would not result in any greater equality in the effect of

indirect taxes on the states. "Perfect uniformity and perfect equality of taxation, in all the aspects in which the human mind can view it, is a baseless dream, as this Court has said more than once. *State Railroad Tax Cases*, 92 U.S. 612." *Edye v. Robertson*, 112 U.S. 580, 595 (1884) (the *Head Money Cases*).

The arbitrary nature of the Alaska exemption is clear because similar exemptions have not been given to other geographic areas of the United States where the costs of the oil business are greater than usual. If the Alaska exemption is validated by this Court, then that will encourage "the spirit of jealousy" and will encourage discrimination between the states. If the Alaska exemption does not prove to be susceptible to the requirements of geographic uniformity, can anyone doubt that the Congressional delegations of the various states will fail to be made aware of the preference successfully given to the State of Alaska?

**B. The decisions of this Court in cases involving either the Bankruptcy Clause or the Port Preference Clause do not alter the fact that the exempt Alaska oil provision is an unconstitutional violation of the Uniformity Clause.**

Article 1, section 8, clause 4 of the Constitution gives Congress the power to establish "uniform laws on the subject of Bankruptcies throughout the United States." In its Brief, the federal government cites *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974) (hereinafter the "*3R Act Cases*"), which was decided under the Bankruptcy Clause, for the proposition that an excise tax can be constitutional even though it does not comply with the requirement of geographic uniformity that is found in the Uniformity Clause. Brief for the United States at 35.

The language from the *3R Act Cases* that the government would like to have made applicable to the Uniformity Clause is the statement that the Bankruptcy Clause "uniformity provision does not deny Congress power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems." *Id.* at 159. Although this Court did state that its construction of the Bankruptcy Clause comports with its construction of other "uniform" provisions of the Constitution, *id.* at 160, the origin of the Bankruptcy Clause and its construction by this Court have been such that the interpretation of the bankruptcy uniformity requirement in the *3R Act Cases* should not be applied to the Uniformity Clause.

In the *3R Act Cases*, the argument was made that the uniformity required by the Bankruptcy Clause was "geographic." *Id.* at 158. As the federal government notes (*see* Brief for the United States at 35), this argument was rejected by this Court as being "without merit because it overlooks the flexibility inherent" in the Bankruptcy Clause. *3R Act Cases* at 158. The inherent flexibility of the Bankruptcy Clause has its origin in the unique history of that provision and distinguishes it from the Uniformity Clause and its geographic uniformity requirement.

The uniformity requirement of the Bankruptcy Clause was placed in the Constitution by its authors to stop the practice, which was common under the Articles of Confederation, by which some states ignored discharges in bankruptcy obtained in other states. Nadelman, *On the Origin of the Bankruptcy Clause,* 1 AM. J. LEGAL HIST. 215, 224-25 (1957). Thus, the reason for including the Bankruptcy Clause links it inextricably to the commerce powers. Indeed, at the Constitutional Convention, the Committee on style inserted the Bankruptcy Clause immediately after the power to regulate commerce. It

seems unavoidable that the Committee intended that the Bankruptcy Clause should be read in light of the Commerce Clause. *Id.* at 227. Also, James Madison, who perhaps more than any other man was the author of the Constitution, recognized the close relationship that existed between the Bankruptcy and Commerce Clauses. He wrote that "*[t]he power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce*, and will prevent so many frauds where the parties or their property may lie or be removed into different states, that the expediency of it seems not likely to be drawn in question." THE FEDERALIST, No. 42, at 266 (J. Madison) (Lodge ed. 1888) (emphasis added).

The close relationship between the Commerce and Bankruptcy Clauses is important, because the federal government's exercise of its authority under the Commerce Clause is not limited by the requirement of national or geographic uniformity. *Secretary of Agriculture v. Central Roig Refining Co.*, 338 U.S. 604, 616 (1950); *Currin v. Wallace*, 306 U.S. 1 (1939); *United States v. Hawes*, 529 F.2d 472, 477 (5th Cir. 1976). As a result, the bankruptcy uniformity clause has been accorded greater flexibility than has the uniformity requirement for excise taxes. "From the beginning, the tendency of legislation and of judicial interpretation has been uniformly in the direction of progressive liberalization in respect to the operation of the bankruptcy power." *Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Railway Co.*, 294 U.S. 648, 668 (1935). Even in this Court's first encounter with the Bankruptcy Clause, Chief Justice Marshall recognized the flexibility that is inherent in this Clause. He wrote that

> [t]he bankrupt law is said to grow out of the exigencies of *commerce*, and to be applicable solely to traders; but it is not easy to say who must

> be excluded from, or may be included within, this description. It is, like every other part of the subject, *one on which the legislature may exercise an extensive discretion.*

*Sturges v. Crowninshield*, 17 U.S. (4 Wheat) 122, 195 (1819) (emphasis added.)

Unlike the power granted by the Bankruptcy Clause, the taxing power is independent of the Commerce Clause. The "power of Congress to tax is a very extensive power." *License Tax Cases*, 72 U.S. (5 Wall.) 462, 471 (1866). The taxing power is granted in the Constitution with only one exception and only two qualifications, the exception being the prohibition preventing taxes on exports, and the qualifications being the requirements of apportionment for direct taxes and uniformity for indirect taxes. *Id.* "More comprehensive words could not have been used." *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533, 540 (1869). In contrast to the Bankruptcy Clause, with its close connection to the commerce power, the Uniformity Clause has had as its objective not the encouragement of commerce, but the restraint of the factionalism that is inherent among the states. To weaken or eliminate the restraints imposed by the geographic uniformity requirement of the Uniformity Clause by giving it a "flexible" interpretation would be to destroy the whole purpose of this clause. To allow a "progressive liberalization" of the geographic uniformity requirement would only serve to excite the Congressional delegations of the various states and encourage an unseemly scramble for advantage. The federal government is thus wrong in suggesting that the more flexible uniformity requirements of the Bankruptcy Clause are comparable to the geographic uniformity requirement of the Uniformity Clause.

Furthermore, this Court's analysis in the recent case of *Railway Labor Executives' Association v. Gibbons*,

455 U.S. 457 (1982), shows that even the "flexible" uniformity requirement of the Bankruptcy Clause does not permit one part of the country to receive favored treatment not accorded to the other parts of the Union. This Court wrote that

> [i]n the *3R Act Cases*, we upheld Congress' response to the existing rail transportation crisis in the Northeast. Since no railroad reorganization proceeding was then pending outside of the region defined by the Regional Railroad Reorganization Act (3R Act), 87 Stat. 985, 45 U.S.C. §701 et seq., the Act in fact operated uniformly upon all railroads then in bankruptcy proceedings.

*Id.* at 1176-77.

It is therefore incorrect for the government to assert that the geographic uniformity requirement for excise taxes can be ignored because of this Court's recognition of the "flexibility inherent" in the Bankruptcy Clause. Such an argument does violence to the interpretations of the Uniformity Clause of this Court and ignores the substantial difference between this latter clause and the Bankruptcy Clause in both purpose and effect.

The federal government also attempts to attack the geographic uniformity requirement of the Uniformity Clause by citing opinions of this Court that interpret the Port Preference Clause. The Port Preference Clause is set out at article 1, section 9, clause 6 as follows: "No preference shall be given by any Regulation of Commerce or Revenue to the Ports of one state over those of another: nor shall vessels bound to, or from, one state, be obliged to enter, clear or pay duties to another."

Instead of weakening the requirement of geographic uniformity that is found in the Uniformity Clause, the

cases decided pursuant to the Port Preference Clause establish that the authors of the Constitution, and later this Court, have consistently regarded the latter two clauses as important and necessary barriers to discrimination between the states. The federal government argues that the prohibitions of the Port Preference Clause do not work to prevent discriminations as long as there is no "systematic" discrimination in favor of, or against, the commerce of a particular state or states. Brief for the United States at 38-39. The federal government further argues that this same standard applies to Uniformity Clause cases as well. The State of Texas believes that the Act does work a systematic discrimination against expensive, hard-to-produce oil in the State of Texas. Moreover, an analysis of the Port Preference Clause cases reveals that this Court has analyzed those discriminations not in terms of whether or not they are "systematic," but rather, in terms of the *direct or incidental advantages* that result to the states from legislation. Direct discrimination against a state or states is prohibited by the Port Preference Clause.

In the recent case of *City of Houston v. Federal Aviation Administration*, 679 F.2d 1184, 1196-98 (5th Cir. 1982), the Fifth Circuit noted that the "authoritative" case on the Port Preference Clause is *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856). There, this Court explained what discriminations against the states were permitted by the Port Preference Clause and what discriminations were prohibited. It stated that:

> [t]here are many Acts of Congress passed in the exercise of this power to regulate commerce, providing for a special advantage to the port or ports of one state and which very advantage may incidentally operate to the prejudice of ports in a neighboring state, which have never been supposed to conflict with this limitation

> upon its power. . . . *It will not do to say that the exercise of an admitted power of Congress conferred by the Constitution is to be withheld, if it appears, or can be shown, that the effect and operation of the law may incidentally extend beyond the limitation of the power.* Upon any such interpretation, the principal object of the framers of the instrument in conferring the power would be sacrificed to the subordinate consequences resulting from its exercise. . . . Thus much is undoubtedly embraced in the prohibition; and it may, certainly, also embrace any other description of legislation looking to a direct privilege or preference of the ports of any particular state over those of another. Indeed, *the clause, in terms, seems to import a prohibition against some positive legislation by Congress to this effect, and not against any incidental advantages that might possibly result from the legislation of Congress upon other subjects connected with commerce,* and confessedly within its power. . . . *The truth seems to be, that what is forbidden is not, discrimination between individual ports within the same or different states, but discrimination between states;* and if so, in order to bring this case within the prohibition, it is necessary to show, not merely discrimination between Pittsburg and Wheeling, but discrimination between the ports of Virginia and those of Pennsylvania.

*Id.* at 433-35 (emphasis added).

The Port Preference Clause does not render legislation unconstitutional if the statute incidentally discriminates against a state or states. Later Port Preference decisions of this Court reaffirm the continued validity of the direct versus indirect discrimination analysis. *See, e.g., South Carolina v. Georgia,* 93 U.S. 4 (1876).

The error in the government's analysis of the Port Preference Clause is also illustrated by its interpretation of *Louisiana Public Service Commission v. Texas & N.O. Railway Co.*, 284 U.S. 125 (1931). *See* Brief for the United States at 37. In this case, the Interstate Commerce Commission set rates for the transportation of sand, gravel, and other commodities in Arkansas, Oklahoma, Texas, and that part of Louisiana west of the Mississippi, including certain points on the east bank of the river. The rates were made applicable to interstate and intrastate transportation and included a provision for a rate of eight cents per ton for ferrying such of the traffic as crossed the Mississippi. The Louisiana Public Service Commission sought to have the rates annuled on the grounds "that the inclusion of the allowance for ferrying the Mississippi gives preference to Galveston, Houston, and other ports of Texas over New Orleans and Baton Rouge in Louisiana in violation of the Constitution, article 1, §9, cl. 6." *Id.* at 130. The federal government cites the Court's rejection of the claim of the Louisiana Service Commission for the proposition that the Port Preference Clause accords "Congress considerable latitude in drawing distinctions between particular ports of different states." Brief for the United States at 37. Such a reading of the case is too broad because it ignores the distinction this Court has made as regards direct versus indirect discrimination: "Congress, acting under the commerce clause, causes many things to be done that greatly benefit particular ports and which *incidentally* result to the disadvantage of other ports in the same or neighboring states." *Id.* at 131 (emphasis added). Certain laws can discriminate against some ports, but only if such discrimination is incidental to the proper exercise by Congress of other powers.

If, as the government claims, the decisions interpreting the Port Preference Clause should be used as an aid in understanding the Congress' powers under the

Uniformity Clause, the direct versus indirect discrimination analysis of the port preference cases only confirms the conclusion that the Alaska exemption is unconstitutional. In exempting large portions of Alaska from the windfall profit tax, Congress directly favored Alaska at the expense of other states. Not even the federal government can claim that there was anything incidental about the discrimination against the other states of the Union.

**C. An excise tax exemption that violates the requirement of geographic uniformity is unconstitutional whether or not Congress could have defined the exempted class in terms that were not constitutionally infirm.**

The government argues that the exempt Alaska oil provision is not a violation of the Uniformity Clause because Congress might have expressed it in a way that does not violate the requirements of geographic uniformity. Brief for the United States at 10, 30. Such an argument ignores the most basic rules of statutory construction.

The language of a statute controls when sufficiently clear in its context. *Ernst & Ernst v. Hoch Felder*, 425 U.S. 185, 201 (1976); *United States v. Oregon*, 366 U.S. 643, 648 (1961). "It is elementary that the meaning of the statute must, in the first instance, be sought in the language in which the act is framed. . . ." *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

The intent of Congress as to the Alaska exemption of the Act could not have been clearer. The exemption shows that the Congress intended that a portion of Alaska receive an excise tax exemption that was not to be extended to any other parts of the United States. As the government admits, "There can, of course, be no dispute that the exemption here at issue is geographically defined so as to exclude oil located in all of the 50

states except portions of Alaska." Brief for the United States at 28. Such an intent is a violation of the Uniformity Clause, and any alternative language that Congress might have used is now irrelevant.

Understandably, the federal government would like the Alaska exemption to be construed in terms of some vague considerations of what might have been, rather than have to deal with the actual language of the statute. Nevertheless, the rules of statutory construction are plain. The language of the statute is of primary importance when interpreting its provisions. As a result, an analysis of the Act must be based on the clear language in the statute and not on some other formulation that Congress might have enacted.

## II. THE INTENT OF CONGRESS AS EXPRESSED IN THE LEGISLATIVE HISTORY OF THE ACT AND THE PROHIBITION AGAINST JUDICIAL LEGISLATION REQUIRE THAT THE ACT IN ITS ENTIRETY MUST FALL.

### A. Legislative history makes it clear that the Alaska oil exemption was intrinsic to the Act's balance of production incentives against revenue raising, that similar exemptions were present in all versions of the windfall profit tax legislation, and that inclusion of the Alaska exemption was critical to the political compromise that resulted in passage of the Act as it exists today.

The general rule for determining whether the unconstitutionality of certain statutory provisions makes necessary the invalidation of the entire act is stated in *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540, 565 (1902): "If an obnoxious section is of such import that

the other sections without it would cause results not contemplated or desired by the legislature, then the entire statute must be held inoperative." Thus, the provisions not held invalid should not be allowed to stand if their separate enforcement would not accomplish "the manifest intent of the legislature." *International Textbook Co. v. Pigg*, 217 U.S. 91, 113 (1910) (hereinafter "*International Textbook Co.*"). The ascertainment of legislative intent lies in an examination of the circumstances surrounding passage of the act, including the history of the act, its context, and the object sought by the legislative body. *See* 2 SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION §44.03 (C. Dallas Sands 4th ed. 1973). If an examination of legislative intent shows that the invalid provisions of the act

> ...are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them.

*International Textbook Co.* at 113, quoting *Warren v. Mayor*, 68 Mass. (2 Gray) 84 (1854). More simply put, if it is evident that the constitutional provisions would not have been passed in the absence of the invalid sections, the act as a whole must fall.

The court below found that "it is . . . clear that the Alaska exemption was the result of negotiations and compromise, and that the Act as it exists today would not have been passed without the invalid Alaska provision." Memorandum Opinion at 11 (reproduced at J.S.

9a). A review of the legislative history confirms the district court's conclusion. Paramount in the concerns of Congress was the need to reduce dependence on foreign crude oil. *See e.g.* 126 Cong. Rec. S2825 (daily ed. Mar. 21, 1980) (remarks of Sen. Schmitt); *id.* at S2848 (daily ed. Mar. 24, 1980) (remarks of Sen. Bellmon); *id.* at S2849 (remarks of Sen. Helms); *id.* at S2855 (remarks of Sen. Baucus); *id.* at S2705 (daily ed. Mar. 20, 1980) (remarks of Sen. Bentsen). The Senate Finance Committee Report made it clear that the solution to the energy problem lay not in taxing energy production, but in decreasing energy consumption and increasing domestic production, and that the Committee bill's program of energy incentives was designed to meet these goals. S. Rep. No. 394, 96th Cong., 2d Sess. 7, *reprinted* in 1980 U.S. Code Cong. & Ad. News 410, 418. Indeed, the legislative history reflects that members of Congress based their support of the various versions of the windfall profit tax bill which appeared during its 10-month Congressional evolution on the inclusion of incentives to increase the domestic production necessary to achieve a greater degree of national energy independence. *See, e.g.*, 126 Cong. Rec. S3026 (daily ed. Mar. 26, 1980) (remarks of Sen. Hayakawa); *id.* at S3035 (remarks of Senators Dole and Thurmond); *id.* at S3053 (remarks of Sen. Harry F. Byrd, Jr.); *id.* at S2856 (daily ed. Mar. 24, 1980) (remarks of Sen. Baucus); *id.* at S2710 (daily ed. Mar. 20, 1980) (remarks of Sen. Dole); *id.* at S2769 (remarks of Sen. Stevens); *id.* at S3029 (daily ed. Mar. 26, 1980) (remarks of Sen. Javits).

It is also evident that Congress found inclusion of production incentives to be not merely desirable, but rather, critical to the balance between generating revenue and encouraging domestic exploration and development. The report on the House Ways and Means Committee bill, which exempted Alaskan oil other than Sadlerochit reserves produced north of the Artic Circle, stated that a heavier tax on Tier 1 and Tier 2 oil and

more lenient treatment of other categories of oil, including Alaskan production, struck "the appropriate balance between revenue needs and production incentives." H.R. Rep. No. 304, 96th Cong., 2d Sess. 14, *reprinted in* 1980 U.S. Code Cong. & Ad. News 587, 600. Senator Long's introduction of the conference report on the bill to the Senate emphasized that the proposal "must balance conflicting considerations of revenue on the one hand and production incentives on the other," and that the conference agreement, which set forth the Act as passed by both the House and the Senate, was "an effective compromise of these competing considerations." 126 Cong. Rec. S2610 (daily ed. Mar. 19, 1980). The discussion of the conference bill which followed shows that the conferees were "continually" mindful of the need for greater domestic production incentives. *Id.* at S2630 (remarks of Sen. Gravel).

The conference compromise was achieved in part by retention of "special incentives for the production of newly discovered, incremental tertiary and heavy oil" and lower tax rates for a portion of independent producer production. *See* 126 Cong. Rec. S2610 (daily ed. Mar. 19, 1980). In addition, to encourage exploration and development only in Alaska, the conference exempted new production north of the Arctic Circle and production from the northerly side of the Alaska-Aleutian Divide and 75 miles or more from the Trans-Alaska Pipeline System. *Id.* at S2630.

Clearly, the exempt Alaska oil provision was one of the weightier elements balancing incentives for domestic production against revenue considerations in the version of the Act which Congress finally approved. From the time of the earliest considerations of proposed windfall profit legislation, Congress was aware of the importance of existing and future Alaskan production to the nation's energy future. As of July 1979, the U.S.

Geological Survey estimated that over 30 percent of remaining potential domestic discoveries were located in Alaska. Congress was told that Alaska has more proven oil reserves than any other state, and that, in terms of volume, Alaskan production ranked second behind that of Texas. Witnesses before Congressional hearings testified to the harsh climatic conditions and transportation problems which have resulted in the large investments, long lead times, and high risk which characterize Alaskan exploration and production.[1] *See Hearings on H.R. 3919 Before the Senate Comm. on Finance*, 96th Cong., 1st Sess. (1979) (statements of Thomas K. Williams and W. T. Slick). The Joint Explanatory Statement of the Committee of Conference emphasized that the exemption of Alaskan oil production reflected the conferees' concern that taxation of this production would discourage exploration and production. H. Conf. Rep. No. 817, 96th Cong., 2d Sess. 103, *reprinted in* 1980 U.S. Code Cong. & Ad. News 642, 656. So significant was this exemption as an offset to the disincentive effect of the taxing provisions, that extension of the tax to the Alaskan oil which Congress specifically intended to exempt would certainly frustrate and in fact negate the intricate balancing of purposes struck by Congress.

There is strong authority for denial of severance where separate enforcement of the valid provisions of an act would, as in the instant case, enlarge its scope or operation. In *Davis v. Wallace*, 257 U.S. 478 (1922), the Court held an exemption from a state excise tax invalid. Ruling that the tax as a whole must fall, the Court stated that

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1. Large investments and high risk are not, however, unique to Alaska. *See* description of exploration of and production from Texas submerged lands, *supra* at p. 11.

> [h]ere the excepting provision was in the statute when it was enacted, and there can be no doubt that the Legislature intended that the meaning of the other provisions should be taken as restricted accordingly. Only with that restricted meaning did they receive the legislative sanction which was essential to make them part of the statute law of the state; and no other authority is competent to give them a larger application.

*Id.* at 484-5; *see also McCorkle v. United States*, 559 F.2d 1258, 1261 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978).

A review of the origin and evolution of the Alaska oil exemption and the political negotiations which led to its inclusion in the Senate bill makes it evident that there was continuous support for the exemption and that, without approval of the exemption, the Act would have been further stalled in Congress, and the other provisions would not have passed in their present form. The Administration bill contained an exemption for all North Slope production and other production transported through the Trans-Alaska Pipeline System. H.R. Doc. No. 96-107, 96th Cong., 1st Sess., *Windfall Profits Tax and Energy Security Trust Fund: Message from the President of the United States* 3 (1979). The House Ways and Means Committee bill exempted Alaskan oil produced north of the Arctic Circle other than oil from the Sadlerochit Reservoir, which was already in production. H.R. Rep. No. 304, 96th Cong., 1st Sess. 30, *reprinted in* 1980 U.S. Code Cong. & Ad. News 586, 612-13. The Senate Finance Committee bill provided for exemption of all newly discovered oil, which category included Alaska production other than Sadlerochit oil. S. Rep. No. 394, 96th Cong., lst Sess. 35-37, *reprinted in* 1980 U.S. Code Cong. & Ad. News 410, 444-6. The Senate debated the tax bill from

November 15, 1979, until December 14, 1979. Comments in the official record allude to lengthy negotiations between senators promoting taxation of newly discovered oil and those favoring retention of the exemption, at least as to Alaska production. *See, e.g.*, 125 Cong. Rec. S17707 (daily ed. Dec. 4, 1979) (remarks of Sen. Byrd). Despite these intense negotiations, the debate was plagued by actual and threatened delay tactics. *Id.* (remarks of Senators Stevens and Byrd). Senator Stevens of Alaska, the acting minority leader, played a significant role in the behind-the-scenes discussions leading to a compromise amendment which applied the tax to newly discovered oil (including newly discovered oil produced in Texas) but exempted newly discovered oil produced north of the Arctic Circle. *See id.* at S18564, 18566 (daily ed. Dec. 14, 1979). Stating his reluctant approval of the compromise, Senator Stevens indicated flat opposition to any additional amendment increasing the tax on Alaska oil. *Id.* at S18565. It is a political reality that in the absence of the compromise supported by Senator Stevens, the taxing provisions would not have survived Senate debate in the form in which they were finally approved by Congress. [2]

The federal government has pointed to the presence of a general separability clause in the Internal Revenue Code, Section 7852(a), in urging severance of the invalid

2. The federal government claims error in the suggestion "that the Alaska oil exemption was the price to obtain the support of the Alaska representatives" (Brief for the United States at 46-47, n.42), since Senator Stevens voted against passage of the Act. As explained above and in the Motion of Taxpayer and Association Appellees to Affirm at 25-27, the key to Senator Stevens' role lay not in his vote on the conference bill, but in his ability to further delay the vote on the Senate Finance Committee bill, his contributions to the compromise amendment to that bill, and, finally, his vote approving the amended bill "in order to give the Senators who represented us in conference the strongest possible position on the bill in conference." 126 Cong. Rec. S2769 (daily ed. Mar. 20, 1980).

Alaska oil exemption. *See* Brief for the United States at 47-48. Assuming arguendo that Section 7852(a) applies to the Act, the court below properly recognized that the presence or absence of such a provision in no way concludes the ultimate decision on severance, and that that decision requires interpretation of legislative intent. [3] Memorandum Opinion at 11 (reproduced at J.S. 8a). The presence of a separability clause merely aids in the determination of legislative intent; it is "not an inexorable command." *Dorchy v. Kansas*, 264 U.S. 286, 290 (1924). At most, a statutory declaration creates a presumption of divisibility. This presumption is overcome by considerations making evident the inseparability of the act's provisions or the probability that the legislative body would have been dissatisfied with the remnant. *Williams v. Standard Oil Co.*, 278 U.S. 235, 242 (1929). *See also Carter v. Carter Coal Co.*, 298 U.S. 238, 312-13 (1936). Thus, even if Section 7852(a) applies, it is again legislative intent which controls. The presumption the general severability clause may raise is overcome by the facts that the Alaska oil exemption was intrinsic to the Act's balance of production incentives against taxing provisions, that similar exemptions were

---

3. Citing *Griffin v. Breckenridge*, 403 U.S. 88, 104 (1971) (hereinafter "*Griffin*"), the federal government suggests that the district court's reliance on legislative intent to make its determination as to severability is in accordance with precedent of "an earlier era" which the Court has rejected. Brief for the United States at 48-49. That legislative intent is still the primary determinative is evident in the recent decision of *Zobel v. Williams*, ______U.S.______, 102 S.Ct. 2309, 2315 (1982). The "rigid separability rule" (Brief for the United States at 48) cited by the federal government and to which *Griffin* referred was the rule that a party challenging a statute's validity could prevail by showing that the statute was unconstitutional in its application to persons other than the party or to circumstances other than those of the party. *See Griffin* at 104 and *United States v. Raines*, 362 U.S. 17, 21-23 (1960).

present in every version of windfall profit tax legislation, and that inclusion of the Alaska exemption was critical to the political compromise which sustained the legislation's progress through the Senate into conference.

The federal government's assertion that "Congress was fully aware . . . that if the Alaska oil exemption were held invalid the exemption would be severed" (Brief for the United States at 46) is based on Senator Long's isolated comment that the tax would extend to oil covered by the Alaskan exemption should the courts hold the exemption invalid. 126 Cong. Rec. S3056 (daily ed. Mar. 26, 1980). It does not follow from Senator Long's statement that his interpretation is correct or that it indicates the view of the entire Congress. *American Smelting & R. Co. v. Occupational Safety and Health Review Commission*, 501 F.2d 504 (8th Cir. 1974). There was neither debate nor vote on the issue of separability. Thus, although Senator Long was floor manager of the bill in the Senate, his remarks are not entitled to the weight which is accorded references to agreement among the sponsors and supporters of the legislation. *Cf. United States v. Dean*, 647 F.2d 779, 787 n.15 (8th Cir. 1981), *cert. denied*, ______U.S.______, 102 S.Ct. 2296 (1982). Indeed, Senator Long acknowledged that a tax on newly discovered Alaskan oil was contrary to the will of Congress when he hastened to voice his expectation that the Senate would act to remedy any judicial extension of the tax to all Alaskan oil. *See* 126 Cong. Rec. S3056 (daily ed. Mar. 26, 1980).

**B. Congress alone has the constitutional authority and the range of options required to take into account, in extension or modification of the tax, policy implications and the impact on the complexities of the windfall profit taxation system.**

The district court found an additional basis for its denial of severance, holding that extension of the tax to all oil produced in Alaska would be an impermissible infringement on the powers and duties of Congress. *See* Memorandum Opinion at 12 (reproduced at J. S. 9a-10a). The reliance of the court below on the prohibition against judicial legislation was proper, since severance would work a vast extension in the operation of the tax and disrupt the balance which Congress deliberately sought between the objectives of revenue-generation and enhancement of domestic production. This Court has held that it is proper to strike an excise tax in its entirety if an exemption is unconstitutional, and that no authority other than the legislature is competent to expand the operation of such a tax. *Davis v. Wallace*, 257 U.S. at 484-85. Moreover, the presence of a general separability clause does not empower a court "to rewrite the substantive provisions" of an act, "a function properly left to the [legislative body]." *U.T. Inc. v. Brown*, 457 F. Supp. 163, 170 (W.D.N.C. 1978). Similarly, where judicial intervention other than severance is sought, courts have been reluctant to upset the balance among interests deliberately fixed by Congress, since balancing is a legislative rather than a judicial function. *See District of Columbia National Bank v. District of Columbia*, 348 F.2d 808, 810 (D.C. Cir. 1965).

The fact that the balance involves revenue-raising considerations does not compel preservation of the tax. In *Marchetti v. United States*, 390 U.S. 39 (1968), the Court held that those who properly asserted the privilege against self-incrimination could not be criminally punished for failure to comply with the registration provisions of a federal wagering tax. The Court was urged to allow continued enforcement of the registration and tax provisions by putting restrictions on the use of information gathered under registration requirements.

The Court stated that it was plain from the face of the wagering-tax system that Congress intended that information collected under the system was to be furnished to interested prosecuting authorities, and that it must assume that imposition of use-restrictions would frustrate a significant Congressional purpose. The Court explained its decision that judicially-imposed use-restrictions would be improper as follows: "We cannot know how Congress would assess the competing demands of the federal treasury and of state gambling prohibitions; we are, however, entirely certain that the Constitution has entrusted to Congress, and not to this Court, the task of striking an appropriate balance among such values." *Id.* at 59-60. In the case of the Act, it is clear from the legislative history that Congress intended to promote energy self-sufficiency by encouraging domestic exploration and production. As a practical matter, it is Congress alone who knows how to assess the competing demands of production enhancement and the U.S. Treasury, and, as a constitutional matter, it is Congress alone that is empowered to make this assessment.

The Constitution of the United States unequivocally gives to Congress the exclusive power to tax. Article 1, section 7, clause 1 provides that "[a]ll Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills." Article 1, section 8, clause 1 grants Congress the power to lay and collect taxes, duties, imposts, and excises. Finally, the sixteenth amendment gives to Congress the power to lay and collect income taxes. There is no constitutional authority for imposition of any type of tax by the judiciary. Congress is, within the limits of the Constitution, supreme in its ability to tax, and "no power of supervision or control is lodged in either of the other departments of the government." *Pacific Insurance Co.*

*v. Soule*, 74 U.S. 95, 7 Wall. 433, 443 (1868). By the same token, even when the attempts of Congress to lay and collect taxes exceed its constitutional limits, the power of the judiciary to invalidate such attempts does not license the courts to, themselves, levy taxes, especially where it was clearly the intent of Congress to exempt the very object of the judicial levy. Severance of the invalid portion of the Act would be de facto judicial taxation which is unauthorized by the Constitution.

The federal government argues that, in the instant case, dictum in *Utah Power & Light Co. v. Pfost*, 286 U.S. 165 (1932), controls the determination of severability. There, a power company challenged a state license tax on the manufacture of electricity, objecting to, among other things, a provision exempting the generation of electricity for irrigation purposes and requiring the power company to credit the exemption to consumers. The Court held that the exemption was not constitutionally infirm. As to the requirement that the exemption be credited to consumers, the Court said that its constitutionality depended on its application, that it did not appear that the power company was in danger of an unconstitutional application of the requirement, that the construction of this requirement was for the state court, and that it could not assume in advance that the construction adopted would be unconstitutional. *Id.* at 186. Nonetheless, the Court made the observation that if the exemption and credit provision *was* unconstitutional, it would be severable from the taxing provisions, since the primary object of the statute was plainly to raise revenue, and the exemption for electricity used to irrigate was secondary. *Id.* at 185. Even granting this attenuated dictum the force of precedent, the facts of this case are distinguishable. It is plain from the legislative history of the Act that the exemption for Alaska oil is not secondary, but rather, essential to the accomplishment of one of the Act's vital aims: to provide domestic production incentives.

The argument against judicial legislation is especially persuasive where, as here, the challenged statute is extraordinarily complex. The taxing provisions of the windfall profit tax legislation are, by themselves, complicated. They set forth categories of taxable crude oil, tax rates which vary according to the nature of the producer and the category of oil produced, "base prices" which vary in similar fashion, and tax offsets. *See* Brief for the United States at 2-5. The taxation system is structured on exceedingly complex federal crude oil price regulations which expired in 1981, the interpretation of which is still a subject of litigation. Certainly the complexities of the taxation system and the windfall profit tax legislation as a whole make this case an inappropriate one for judicial extension of the tax. "[W]here Congress . . . has enacted specific, carefully-tailored legislation, it would be inappropriate for a court to undertake piecemeal extensions of the principles reflected in this legislation merely because it is desirable, especially in view of the fact that Congress saw fit not to provide for these extensions." *United States v. General Douglas MacArthur Senior Village, Inc.*, 470 F.2d 675, 679 (2d Cir. 1972), cert. denied, 412 U.S. 922 (1973).

In the course of this challenge to the Act, the federal government has suggested to the courts three options for curing the invalidity of the Alaska exemption: extension of the tax to all Alaskan oil through severance, exemption of all newly discovered oil (*see* Brief for the United States at 50 n.46), and extension of the exemption to crude oil production from all areas similar to the Arctic Circle or located more than 75 miles from a pipeline connection (*see* Reply Brief for the Defendant United States and in Opposition to Motions for Summary Judgment of Plaintiffs and Intervenors, 10). The prohibition against judicial legislation applies to the latter two options as well as to extension of the tax. The federal government's suggestions show, however, the

options properly available to *Congress* to cure the Act. Unlike the courts, Congress can choose from a multitude of legislative actions, including modification of tax rates and base prices and exemptions of other crude oil which is difficult and expensive to produce. The remedy for this Act is best left to those who drafted and passed it and whose legitimate range of actions is most flexible.

Congress alone has the constitutional authority to tax. It has first-hand knowledge of the policy considerations which shaped the Act and the policy implications of extensions or modification of the tax. Congress is fully aware of the complexities of the tax, and Congress alone can cure the Act, taking into account all its complexities. For these reasons, the refusal of the district court to judicially legislate by severing the Alaska oil exemption is correct.

## CONCLUSION

Title I of the Crude Oil Windfall Profit Tax Act of 1980 is unconstitutional because it is in violation of the geographic uniformity requirement of the Uniformity Clause. By exempting portions of Alaska from taxation, this statute discriminates in favor of Alaska and against the other states of the Union. That such discrimination between the states is prohibited by the Uniformity Clause is illustrated by the decisions of this Court. The Alaska exemption is a central feature of the Act and was necessary to the political compromise that produced this statute. As a result, the unconstitutionality of the exemption invalidates the entire Act.

For the reasons set forth above, the decision of the District Court should be affirmed.

Respectfully Submitted

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# Activity due in Texas waters of Gulf of Mexico



Major exploration efforts and continued development are on tap next year in Texas waters of the Gulf of Mexico.

Action will be in shallow waters along the coast in the areas of Padre and Mustang islands. Projects include deep exploratory drilling in the North Padre Island area by ARCO Exploration Co. in its recently approved, 43,000 acre, "Project Monster Unit" off Kenedy County.

In addition, Genesis Petroleum Corp. plans to drill rank wildcats on as many as nine prospects in the South Padre-North Padre Island areas.

**ARCO's plans.** ARCO plans to spud its first unit wildcat about July 1983 in North Padre Island Block 960-L.

The wildcat, targeted probably to the middle Frio, is projected to 23,000 ft in 50-60 ft of water. A second test is tentatively planned for April 1985.

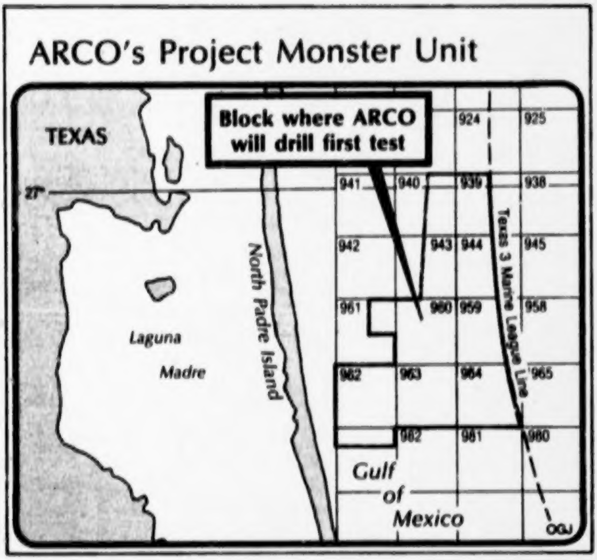
The Texas School Land Board approved the Project Monster Unit in October. The unit involves 34 leases, all with 5 year terms. Earliest expiration date is Apr. 1, 1985.

Water depths average 50-80 ft.

ARCO estimates dry hole costs on the first well at about $30 million. And it estimates another $20 million potential investment to evaluate and complete the well.

It acquired 100% interest in the acreage in state sales held Apr. 1, 1980; Oct. 7, 1980; and Apr. 6, 1982. All leases provide for 25% royalty to the state.

ARCO paid an average of $46/acre for the leases. Highest price paid was $90,720—$63/acre—for each of the 1,440 acre quarters of North Padre Island Block 960-L, acquired in the April 1980 sale.




Jack L. Keplinger, ARCO exploration manager, offshore region, said the July planned spud date might not be met for the first test because ARCO has to obtain special alloy pipe.

It plans to drill the acreage using one rig, possibly Marine Drilling Co.'s J Storm VII jack up.

Nearby, in federal waters, ARCO Oil & Gas Co. has gas production in about 122 ft of water from two platforms in North Padre Island Blocks 956 and 967 serving its Block 967 field.

ARCO owns 75% working interest and Transco Energy Co. 25% interest in the blocks.

**Genesis plans wildcats.** Genesis, which has one of the largest acreage positions in the South Padre-North Padre Island areas, plans to drill wildcats on eight or nine prospects, including some on adjacent federal acreage.

All wells will be 10,000 ft deep or less, testing the Miocene *Bigenerina humblei* and *Amphistegina* sands.

It plans soon to spud a test in the southeastern quarter of South Padre Island Block 1047-L.

The site is about 55 miles south of the block where ARCO will drill its first test.

It has under lease a little more than 30,000 net acres in state and federal waters in the area and has teamed with HNG Fossil Fuels Co., a Houston Natural Gas Co. subsidiary, in an exploration venture in the area.

Genesis selected the area for exploration because of the proximity to a 20 in., 68 mile pipeline operated by Valley Pipeline Inc., an HNG subsidiary. Gas comes ashore south of Corpus Christi. Valley is purchasing gas from McMoRan's South Padre Island Block 1064-L field nearby.

McMoRan has two platforms on the block.

Miocene production began in August 1981.

Production currently is running at about 26 MMcfd. •

No. 82-1066

IN THE
# Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, *Appellant*,

v.

HARRY PTASYNSKI, *et al.*, *Appellees*.

**On Appeal from the United States District Court for the District of Wyoming**

# BRIEF OF ASSOCIATION APPELLEES

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April 1983

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## QUESTIONS PRESENTED

1. Whether exemption of oil production in most of the state of Alaska from taxation under the Crude Oil Windfall Profit Tax Act violates the constitutional requirement that excise taxes be uniform throughout the United States. U.S. Constitution, Article 1, Section 8, Clause 1.

2. If the tax is held unconstitutional, whether the extreme complexity of the windfall tax, the delicate political compromises embodied in the structure of tax rates, the need to balance production incentives with revenue generation, and the other significant policy considerations involved in determining whether the tax should be extended to Alaska, dictate that the proper remedy is to invalidate the tax in its entirety and thereby return to Congress the responsibility for restructuring the tax.*

*The names of all parties in the Court whose judgment is being reviewed are set forth in the caption of the District Court opinion (J.S., 1a). None of the corporate parties has a parent company, subsidiary (other than a wholly-owned subsidiary) or affiliate.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

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No. 82-1066

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UNITED STATES OF AMERICA, *Appellant*,

v.

HARRY PTASYNSKI, *et al.*, *Appellees*.

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**On Appeal from the United States District Court for the District of Wyoming**

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## BRIEF OF ASSOCIATION APPELLEES

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### STATEMENT

The association appellees submit the following brief urging this Court to affirm the decision of the district court. The thirty-one association appellees include in their combined memberships most of the independent oil producers in the United States; they have direct experience respecting the origins of the Crude Oil Windfall Profit Tax, its subsequent revisions, the impact of the tax, and the difficulties of curing its constitutional defects. The other parties to this action have described the facts at great length, and further description would not aid the Court in resolving this case. Rather than duplicate arguments made in the briefs of the other appellees, the association appellees have limited their presentation to issues that may be particularly illuminated by the associations' unique perspective.

### A. Operation of the Windfall Tax

The tax imposed by Title I of the Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223, 94 Stat. 229[1], is generally described in the Government's brief (Gov. Br. 2-5) and the brief of the Taxpayers. The complex "tier" structure of the windfall tax is displayed in a chart contained in the district court's opinion (J.S. App. 3a). Some further description is necessary, however, to adequately characterize the tax.

Although referred to as a "windfall profits" tax, the tax is in fact wholly unrelated to profit. The "windfall profit" is a statutorily defined amount, not a profit in the sense of after-cost earnings. The tax is levied upon individual barrels of oil at the time of production and removal from the property where the oil is produced. Because of this characteristic, the windfall tax is specifically identified by Congress as an excise tax. Section 4986(a). The tax applies only to domestically produced crude oil; it does not tax crude oil produced in foreign countries and imported into the United States. The windfall tax is the largest single tax ever adopted in the United States, 125 Cong. Rec. S16,842 (daily ed. Nov. 16, 1979). It is imposed on a group of taxpayers—domestic crude oil producers and royalty owners—comprising less than 1 percent of the total population of the United States.

Computation of windfall tax liability is exceedingly complex. The amount of the tax is determined by applying tax rates, varying from 30 percent to 70 percent, to the difference between the actual selling price of each barrel of oil and an arbitrarily determined adjusted base price. Section 4987. Both the tax rate and the base price vary depending on: (1) the category of the oil under the Department of Energy crude oil

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[1] Hereinafter referred to as the "windfall tax" or "the Act." Provisions in the Act are hereinafter cited as codified in the Internal Revenue Code, at 26 U.S.C. Sections 4986-4998 (Supp. IV 1980 and Supp. V 1981).

price control regulations as they existed on either March 1, 1979, or June 1, 1979 (depending on which provision of the Act is being interpreted)[2], and (2) the classification of the owner as an independent producer, royalty owner, integrated company, or governmental entity. There are at least thirteen different categories of crude oil, four tax rates, and four classifications of producers. The adjusted base price is altered quarterly. Section 4989(a). The crude oil produced from a particular property, and even from a single well, can fall within several different categories and classifications for tax purposes.

The Act establishes numerous classifications of crude oil and several exemptions. All but the Alaska exemption are defined either by the identity of the owner of production (*e.g.*, governmental, charitable, and Indian exemptions)[3] or by the physical characteristics of the oil (*e.g.*, heavy oil)[4] or by the physical characteristics of the method or nature of production (*e.g.*, stripper well production)[5]. The Alaska exemption is defined solely by reference to geographic boundaries:

> (e) *Exempt Alaskan oil.*—For purposes of this chapter, the term 'exempt Alaskan oil' means any crude oil (other than Sadlerochit oil) which is produced—
>
> (1) from a well located north of the Arctic Circle or from a reservoir from which oil has been produced in commercial quantities through such a well, or

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[2] While the Department of Treasury administers and collects the tax, Section 4996(b)(8) incorporates by reference the Department of Energy Crude Oil Price Control Regulations, which are considered as continuing in effect for the life of the tax notwithstanding termination of crude oil price controls by Exec. Order No. 12287, 46 Fed. Reg. 9909 (1981).

[3] Section 4991(b).

[4] Section 4991(c).

[5] Section 4994(g).

(2) from a well located on the northerly side of the divides of the Alaska and Aleutian ranges and at least 75 miles from the nearest point on the Trans-Alaska Pipeline System.[6]

The vast area, both in terms of petroleum resources and of geographic size, exempted from taxation by this provision is described *infra* at pp. 8-10.

### B. The Proceedings Below

This action was initiated by complaint filed October 14, 1980, in the Federal District Court for Wyoming on behalf of the Independent Petroleum Association of America, thirty other national, state and regional associations of producers and royalty owners of crude oil,[7] and several individual taxpayers

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[6] Section 4994(e), as amended by the Technical Corrections Act of 1982, Pub. L. No. 97-448, 96 Stat. 2365. The Technical Corrections Act corrected grammatical but not substantive defects in the language of the provision as originally adopted.

[7] American Association of Petroleum Landmen, Association of Oilwell Servicing Contractors, Eastern Kansas Oil and Gas Association, Liaison Committee of Cooperating Oil and Gas Associations, Arkoma Basin Independent Gas Producers Association, California Independent Producers Association, Illinois Oil and Gas Association, Indiana Oil and Gas Association, Independent Oil and Gas Association of West Virginia, Independent Petroleum Association of Mountain States, Kansas Independent Oil and Gas Association, Louisiana Landowners Association, Inc., Michigan Oil and Gas Association, New York State Oil Producers Association, Independent Oil Producers Tri-State, Inc., Independent Petroleum Association of New Mexico, Kentucky Oil and Gas Association, Ohio Oil and Gas Association, Panhandle Producers and Royalty Owners Association, Pennsylvania Oil and Gas Association, Tennessee Oil and Gas Association, Virginia Oil and Gas Association, Oklahoma Independent Petroleum Association, Pennsylvania Grade Crude Oil Association, Permian Basin Petroleum Association, Texas Independent Producers and Royalty Owners Association, and the West Central Texas Oil and Gas Association.

who sought windfall tax refunds. The States of Louisiana and Texas were subsequently granted intervention, and the trial court directed that the associations be designated intervenors with the individual taxpayers remaining as plaintiffs.

The Independent Petroleum Association of America is a national association of independent explorer-producers of domestic crude oil and natural gas. The combined membership of the thirty-one appellee associations represent virtually all of the 15,000 independent producers of crude oil and natural gas in the United States, together with many thousands of royalty owners. The explorer-producer members of the associations conduct approximately 90 percent of the wildcat exploratory drilling, drill 85 percent of all wells, and have discovered 56 percent of the present proven reserves of crude oil and natural gas in the United States.

After extensive briefing and lengthy oral argument, the district court found in favor of the plaintiffs/intervenors and against the Government. The court awarded refunds to the individual taxpayer plaintiffs and ruled that Title I of the Crude Oil Windfall Profit Tax Act was unconstitutional. In so ruling, it examined and rejected arguments identical to those which the Government presents here. (J.S. App. 7a, 9a, and 10a.)

## SUMMARY OF ARGUMENT

The Crude Oil Windfall Profit Tax is an excise tax, Section 4986(a), and thus is subject to the constitutional requirement that excise taxes be uniform throughout the nation. U.S. Constitution, Article 1, Section 8, Clause 1 (the Uniformity Clause). This Court has interpreted the Uniformity Clause to require geographic uniformity in taxation. This requirement is clearly violated by the windfall tax, which is not geographically uniform since it fails to tax oil production in a vast region covering most of the State of Alaska. This area is entirely exempt from the tax burden that falls upon oil producers and royalty owners in the remainder of the United States.

The Uniformity Clause is one of the few limitations upon Congress's broad taxation powers. The requirement of uniformity has a sound policy basis—and provides true substantive protection for taxpayers. It discourages regional favoritism in the formulation of tax policies, and fosters the equal treatment of industries in various states. That there is a need for such protection is amply demonstrated by the adoption of the Crude Oil Windfall Profit Tax, the largest tax ever imposed on a single industry. The unconstitutional exemption of Alaskan oil production was essential to the passage of the tax. If uniform tax treatment had been required, the tax, if passed at all, would have emerged from Congress in a very different form.

The Alaska exemption is a major deviation from absolute uniformity. The exempt area alone is larger than any other state in the Union—and its exemption from taxation has already attracted hundreds of millions of dollars of oil industry investments that might otherwise have gone to different regions. This huge discrepancy resulted from a political combination of non-oil-producing states, joined by the State of Alaska, which harmed the vital interests of oil-producing states. Such a combination is the classic form of political conduct prohibited by the Constitution's Framers in the Uniformity Clause.

If the windfall tax is found unconstitutional, the proper remedy is to invalidate the tax as a whole, so that Congress can start afresh if replacement legislation is deemed necessary. Judicial extension of the tax to Alaska would raise complex policy questions because it would alter the crucial political compromise reached by Congress, it would violate fundamental principles of equity by taxing those who had invested in reliance on the Alaska exemption, and it would introduce further confusion and inconsistencies into the structure of the tax.

This brief also addresses certain inaccuracies in the Government's arguments regarding the legislative history and practical operation of the windfall tax, insofar as significant misconceptions might affect this Court's deliberations.

## ARGUMENT

### I. THE WINDFALL TAX IS AN EXCISE TAX IMPOSED ON CRUDE OIL PRODUCTION IN THE UNITED STATES BUT EXEMPTING OIL PRODUCED IN ONE REGION; THE TAX THEREBY VIOLATES THE CONSTITUTIONAL REQUIREMENT THAT "EXCISES SHALL BE UNIFORM THROUGHOUT THE UNITED STATES."

The constitutional challenge raised by the associations and the other appellees is extraordinarily straightforward. The language of the Constitution requires uniformity in excise taxation. U.S. Constitution, Article I, Section 8, Clause 1. The windfall tax is an excise tax, Section 4986(a)[8], which is defined in non-uniform geographic terms, since one portion of the country is exempt from taxation.[9] Therefore, as demonstrated in the briefs of the other appellees, the windfall tax on its face violates the Uniformity Clause.

In this section, the associations will highlight points that have not been fully addressed by other parties. First, the exemption of Alaskan oil is, in practical effect, a major deviation from a clear constitutional requirement. The exemption is the result of exactly the type of regional political dealing the Framers proscribed through the Uniformity Clause. The extremely burdensome financial and administrative requirements of the windfall tax are a significant detriment to producers in the non-exempt regions of the country, even though the amount of projected revenues has declined sharply in the past three years. Finally, the Government's attempt to avoid the uniformity requirement by identifying the subject of the tax as "windfall profits" rather than oil production is entirely in-

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[8] Section 4986(a) provides "An excise tax is hereby imposed on the windfall profit from taxable crude oil removed from the premises during each taxable period."

[9] Section 4994(e) (quoted *supra* at pp. 3-4) defines "exempt Alaskan oil," which is exempted from taxation under Section 4991(a) and (b).

consistent with the structure of the Act and with the basic characteristics of excise taxation.

### A. The Alaska Exemption Represents a Major Deviation from the Constitutional Requirement of Uniformity.

By whatever measure the Alaska exemption is evaluated, it is a significant deviation from absolute geographic uniformity. Both the Jurisdictional Statement and Brief for the United States repeatedly refer to the Alaska exemption as a "North Slope" or "Arctic" exemption as though only a relatively small part of the State of Alaska is exempt. Such an implication is grossly misleading. The physical area encompassed by the exemption is vast, containing approximately three-fourths of the State of Alaska. (See map at Appendix A, *infra.*) The exemption is also enormous in terms of daily production and estimated future reserves.

The exempt area of Alaska—over 400,000 square miles—is *larger than any other single state*, and is larger than the *combined* size of the states of Maine, Massachusetts, Rhode Island, Pennsylvania, New Hampshire, Vermont, New Jersey, New York, South Carolina, North Carolina, Maryland, Delaware, Georgia, Connecticut, Virginia and West Virginia. Hammond, *The Whole Earth Atlas, passim* (1980).

Presently, oil is being produced from one oilfield in the exempt area, the Kuparuk River field, at the enormous rate of over 100,000 barrels per day. This production is estimated by the U.S. Geological Survey to increase to 250,000 barrels per day by 1986. *1982 Annual Report on Alaska's Mineral Resources*, U.S. Geological Survey Circular 884, at 17 (1982). Production from this oilfield alone is more than the total production of most states. Only the states of Texas, Louisiana, Oklahoma, California, Wyoming, and the non-exempt portions of Alaska produce more oil than the Kuparuk River field. Additional exempt production is expected soon from the Lisburne reservoir in the Prudhoe Bay field, and additional reserves are yet to be developed in the Kuparuk River field. *Kuparak to Become Second-Largest Oil Field in U.S.*, Oil and

Gas J., July 12, 1982, at 81. All of this is in addition to reserves already discovered in several areas offshore Alaska. See Brief *Amicus Curiae* of Atlantic Richfield Company at 2. Conoco has made two recent discoveries in the exempt area at Gwydyr Bay and Milne Point, each thought to be capable of producing about 50,000 barrels per day. *ARCO Alaska Begins Kuparuk Pilot Waterflood*, Oil and Gas J., March 14, 1983, at 38.

The State of Alaska estimated that 10.2 billion barrels of recoverable oil had been discovered on Alaska's North Slope as of August 1980.[10] National Petroleum Council, *U.S. Arctic Oil & Gas* 10 (1981). An additional 24 billion barrels of undiscovered recoverable oil were predicted to be present. *Id.* These oil reserves amount to almost 50 percent of undiscovered recoverable resources in the entire United States. *Id.* at 20. These figures include a high percentage of offshore resources, but do not include estimates for onshore areas south of the Arctic Circle, where the Bureau of Land Management is studying millions of acres for oil and gas leasing pursuant to the Alaska National Interest Lands Conservation Act, 16 U.S.C. Section 3148 (Supp. V 1981). *Oil and Gas Leasing Program for Non-North Slope Federal Lands in Alaska*, Department of Interior Ann. Rep. (1982).

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[10] The richness of Alaska's already commercially producing petroleum reserves is indicated by the state's distribution of cash payments to citizens of the state, as a direct result of revenues from oil production. See Alaska Permanent Fund Corp., 1982 Annual Report and Financial Statements 11 (1982). The original distribution scheme was stricken in *Zobel* v. *Williams*, 102 S. Ct. 2309, 2315 (1982), wherein this Court described the rapid growth of Alaska's petroleum revenues:

> The 1967 discovery of large oil reserves on state-owned land in the Prudhoe Bay area of Alaska resulted in a windfall to the State. The State, which had a total budget of $124 million in 1969, before the oil revenues began to flow into the state coffers, received $3.7 billion in petroleum revenues during the 1981 fiscal year. This income will continue, and most likely grow for some years in the future.

102 S. Ct. at 2311.

The importance of Alaska as an oil producing state was frequently emphasized in the congressional debates on the windfall tax. The Senate and Conference reports specifically noted the importance of reserves in the Kuparak and Lisburne formations. S. Rep. No. 394, 96th Cong., 1st Sess. 43 (1979); H. Rep. No. 817, 96th Cong., 2d Sess. 102 (1980). See 126 Cong. Rec. H1842-43 (daily ed. March 13, 1980)(remarks of Rep. Young) (oil from Alaska has helped stabilize a steady ten-year decline in American production); 125 Cong. Rec. S17666 (daily ed. Dec. 3, 1979) (remarks of Sen. Stevens) (Alaska produces about one out of six barrels of all domestically produced oil, amounting to 1.3 million barrels per day); 126 Cong. Rec. S2772 (daily ed. March 20, 1980) (remarks of Sen. Bellmon) (Alaska is "probably the most promising province remaining in this country for developing domestic oil supplies").

The congressional decision to exempt Alaskan production created a significant area in which oil production was treated more favorably than in any other state. This vast geographic non-uniformity is directly contrary to the explicit standard of the Uniformity Clause.

**B. The Windfall Tax Is the Result of Actions By a Combination of States Which Strike at the Vital Interests of a Minority of States.**

The Uniformity Clause requires that "wherever a subject is taxed anywhere, the same must be taxed everywhere throughout the United States and at the same rate." *Knowlton* v. *Moore*, 178 U.S. 41, 84 (1900). A tax must operate "with the same force and effect in every place where the subject of it is found." *Head Money Cases*, 112 U.S. 580, 594 (1884). The Government seeks to imply exceptions into the Constitution's straightforward rule. *Inter alia*, it urges that the Uniformity Clause was designed only to prevent majorities of states from oppressing minorities, and thus an exemption for only one state cannot violate the Uniformity Clause. This interpretation is clearly inconsistent with the historical reasons for adop-

tion of the Uniformity Clause and with unambiguous judicial precedent.

Even if the Government were correct in its assertion that the Uniformity Clause operates only when a majority of states oppresses a minority[11] the windfall tax would nevertheless violate the Uniformity Clause. The legislative history[12] confirms that those states with little or no crude oil production (which thus would bear little or no tax burden), along with the state of Alaska, combined to enact a tax that would be borne to an exceedingly disproportionate degree by the few states with significant amounts of crude oil production.

The windfall tax was approved by the House of Representatives on a vote of 302 in favor to 107 against. 126 Cong. Rec. H1861 (daily ed. March 13, 1980). Of the 435 congressional districts in the United States, only 170, including Alaska, have any oil production.[13] Many of these have only nominal amounts of production. The presence or absence of oil production in a state or district appeared to be a significant factor influencing votes on the windfall tax. In the Senate, the windfall tax was approved by a vote of 66 in favor to 31 against. 126 Cong. Rec.

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[11] The Uniformity Clause is also intended to prevent the granting of preferences to particular states or regions. J. Story, *Commentaries on the Constitution of the United States*, 683 (4th ed. 1873). See discussion in La. Mot. to Aff. 5-8.

[12] Congressional debates on the windfall tax are detailed in the Taxpayer and Association Appellees Mot. to Aff. 23-28, and in the briefs of the taxpayer appellees and the States of Louisiana and Texas. An excellent discussion of the windfall tax, its legislative history and underlying concepts, and the characteristics of the domestic petroleum industry is found in Drapkin & Verleger, *The Windfall Profit Tax: Origins, Development, Implications*, 22 B.C.L. Rev. 635 (1981).

[13] *The Almanac of American Politics, 1982*; Independent Petroleum Association of America, *The Oil Producing Industry In Your State* (1982).

S3151 (daily ed. March 27, 1980). As in the House, voting in the Senate also appeared to be influenced by the presence of oil production in a state. In fact, thirteen of sixteen senators from the eight top oil producing states voted against the tax.

Notwithstanding the large number of states and congressional districts without significant oil production, passage of the tax in the Senate remained blocked until a political deal was struck which assured the exemption of new production in the State of Alaska. The Acting Minority Leader of the Senate at the time, Senator Stevens of Alaska, played a key role in first blocking and then permitting consideration and passage of the tax by the Senate. See 125 Cong. Rec. S17707 (daily ed. Dec. 4, 1979); 125 Cong. Rec. S18041 (daily ed. Dec. 7, 1979); 125 Cong. Rec. S18564-65 (daily ed. Dec. 14, 1979). Without his cooperation, it is likely that no tax would have passed the Senate. See 125 Cong. Rec. S18041 (daily ed. Dec. 7, 1979). These aspects of the legislative history lead to the conclusion that passage of the windfall tax was indeed the result of a combination of non-oil-producing states, with significant assistance from the Alaska delegation in exchange for the Alaska exemption.[14]

This Court has consistently interpreted the Uniformity Clause to proscribe regional favoritism and to secure equal treatment for business development in each of the states. As this Court stated in its first consideration of the Uniformity Clause, *Hylton* v. *United States*, 3 U.S. (3 Dall.) 171, 180 (1796), the Clause required that "[t]he articles taxed in one state should be taxed in another . . .; *in this way the pressure on industry will be equal in the several states. . . .*" In other words, one state should not be given an advantage over another state in its ability to attract industry and new invest-

[14] More detailed discussions of the importance of the Alaska compromise in congressional passage of the windfall tax are contained in the Taxpayers and Associations Mot. to Aff. 23-28; Louisiana Mot. to Aff. 18-19.

ment or to maintain existing industries in a viable fashion, or in its respective ability to extract local tax revenue from industries within its boundaries.

The very section from Story's *Commentaries* that is strongly relied upon by the Government (Gov. Br. 26-27), shows that a concern for equal business opportunity motivated the Constitution's Framers to create the Uniformity Clause:

> Unless duties, imposts, and excises were uniform, the grossest and most oppressive inequalities, vitally affecting the pursuits and employments of the people of different States, might exist. The agriculture, commerce, or manufactures of one State might be built up on the ruins of those of another; and a combination of a few States in Congress might secure a monopoly of certain branches of trade and business to themselves, to the injury, if not to the destruction, of their less favored neighbors . . . . New York and Pennsylvania might, by an easy combination with the Southern States, have destroyed the whole navigation of New England. A combination of a different character, between the New England and the Western States, might have borne down the agriculture of the South; and a combination of a yet different character might have struck at the vital interests of manufacturers.[15]

These same important concerns are raised by the combination that produced the windfall tax. Alaska's advantage over other oil producing states is illuminated by the Brief *Amicus Curiae* of the Atlantic Richfield Company. The Alaska exemption has attracted the investment from Atlantic Richfield of:

> [A]lmost $700 million in development of the Kuparuk River field, including transportation facilities, since enactment of the Windfall Profit Tax, and its current plans call for an ultimate investment of approximately $4 billion. *Atlantic Richfield has increased the scope of its Kuparuk*

[15] J. Story, *Commentaries on the Constitution of the United States*, 683 (4th ed. 1873).

*investments and accelerated their timing in reliance on the "Alaskan oil" exemption.*[16]

These statements demonstrate that enormous investment resources were focused on Alaska as a result of the congressional declaration that new Alaskan production would not share the same tax burdens as similar investments elsewhere. Significant activities are either underway or planned within the exempt area.[17] The State of Alaska has been given a distinct advantage over the other producing states in attracting such investment.[18]

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[16] Brief *Amicus Curiae* of Atlantic Richfield Company, at p. 2 (emphasis added).

[17] See, *e.g.*, *ARCO Alaska Begins Kuparuk Pilot Waterflood*, Oil and Gas J., March 14, 1983, at 38; *North American Arctic*, Oil and Gas J., July 12, 1982, at 71; *North American Artic*, Oil and Gas J., April 13, 1981, at 63; Wall Street Journal, March 16, 1983, at 7, col. 1-3; New York Times, Sept. 30, 1982, at D5, col. 2; New York Times, Aug. 12, 1982, at D4, col. 6.

[18] The "ripeness" issue raised by the Government (Gov. Br. 40-42, 41 n.35, 42 n.36) is discredited by these investment realities, as well as by the facial non-uniformity of the Act. It is not necessary for a determination of constitutionality to await the occurrence of any external event when it is apparent that the Act will operate without the requisite geographic uniformity. However, it is clear that injury was caused by the non-uniformity even before commercial production commenced in the exempt Alaskan area. Injury from unequal investment opportunities occurred long prior to the time that commercial production began. See affidavit of Kye Trout, attached to Motion of Taxpayers and Associations for Summary Judgement (J.A. 52) describing Atlantic Richfield's long time periods of exploratory work prior to commercial production and noting that 71 discovery wells were drilled in the Kuparuk River field prior to the commencement of commercial production. See also Staff of Joint Comm. on Taxation, *The Design of a Windfall Profit Tax*, 96th Cong., 1st Sess., 21 (Comm. Print 1979).

The mere fact the Alaska exemption described by Section 4994(e) is phrased in terms of geographic landmarks other than the perimeter of the State of Alaska does not, as the government contends (Gov. Br. 27 n.31), excuse the lack of uniformity. Obviously the Arctic Circle, insofar as it has any relevance to the United States, exists wholly in the State of Alaska. Likewise, the other geographical terms defining the Alaska exemption occur only within Alaska. That the exemption is defined and indeed related solely to the geographic location of the oil is not and cannot be disputed. Indeed, the Government concedes:

> There can, of course, be no dispute that the exemption here at issue is geographically defined so as to exclude oil located in all of the 50 states except portions of Alaska. (Gov. Br. 28).

In economic terms, the Alaska exemption distorted the incentives for investment. Rather than encouraging investment in new oil production wherever it might occur (and wherever it might be developed most efficiently), Congress created disproportionate incentives for production in one part of the country. Although they would not have expressed their concerns in these terms, this was exactly the harm that the Founding Fathers feared when they adopted the Uniformity Clause. They recognized the ability of selective taxation to influence the direction of industrial and commercial growth. Although Congress is empowered to structure its tax policies to favor one industry over another, it cannot use blatant geographic discrimination to encourage an industry in one area and discourage it in another. The fear of such a preference for industrial development in one state, at the expense of similar development in other states, is exactly what prompted the Framers to include the Uniformity Clause in the Constitution.

### C. Although Projected Revenues from the Windfall Tax Are Now Less Than One-Third of the Amount Originally Anticipated, the Windfall Tax Is Nevertheless a Heavy Burden on Oil Producers in the Non-Exempt Areas of the Country.

In order to fully describe the extent to which the non-uniformity of the Alaska exemption creates a major deviation from uniform nationwide tax treatment, it is necessary to examine the burden the windfall tax places on oil producers and royalty owners in other parts of the country. This burden includes not just a 30 percent to 70 percent tax liability on "windfall profits," but also includes immense administrative compliance costs. These administrative costs remain constant, even though tax revenues have fallen because of declining oil prices.

The Government's brief (Gov. Br. 12 n.16) discusses the magnitude of the windfall tax revenues involved, both with respect to amounts previously collected and projected revenues for the future. Interestingly, the figure quoted for projected revenues for the next five years—$50 billion—has now been revised downward by 50 percent to $30 billion during the next *six* years. Motion to Set Case for Oral Argument During the Present Term of Court, at 2. This downward revised estimate is in keeping with recent Department of Treasury projections which now predict that the windfall tax, rather than generating a minimum of $227 billion, is more likely to generate no more than $75 billion throughout its expected lifetime. Office of the Secretary of the Treasury, Office of Tax Analysis, quoted in Jennrich, *U.S. "Windfall Profits" Tax Seen Falling $152 Billion Short of Target*, Oil and Gas J., March 7, 1983, at 29.

When Congress adopted the windfall tax, it accepted projections of net revenue to the federal treasury averaging $20.7 billion per year in the period 1980-1990. These projections were based on the faulty premise that crude oil prices would increase dramatically throughout the time period, notwithstanding repeated demonstrations by the petroleum

industry and independent economists that decontrol of oil prices would result in *increased supplies* of crude oil and *decreased prices.* With crude oil prices having declined from around $40 per barrel to under $30 per barrel, events have demonstrated the fallacy of the assumptions underlying adoption of the tax.[19]

In contrast to these declining revenues, the extreme administrative burdens in complying with the tax have not abated. Passage of the complex Act presented producers, purchasers, royalty owners, and even tax collectors with an administrative nightmare. The complexities of the administrative process are illustrated in the schematic diagram attached as Appendix C. The Act is so complex that, although it has been in force for more than three years, the meaning of some of its most fundamental provisions remains unclear. Regulations to implement the tax are either totally unavailable, proposed but not

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[19] Although neither the U.S. Department of Treasury nor Congress has ever publicly disclosed the exact projections of crude oil prices upon which revenue estimates were based, information has been published concerning the total anticipated revenues annually and volumes of crude oil in each tax tier. With such information it has been possible to reconstruct the revenue generation model which reflects expectations of annual average per barrel crude oil prices as follows: 1980 - $37.30; 1981 - $41.17; 1982 - $45.27; 1983 - $49.59; 1984 - $54.12; 1985 - $58.84; 1986 - $63.74; 1987 - $68.92; 1988 - $74.52; 1989 - $80.57; 1990 - $87.11. These figures have been confirmed with Lyndon C. Smith, Economist, Joint Committee on Taxation, U.S. Congress, who provided the estimates of revenue set forth in the Conference Report, H.R. Rep. No. 817, 96th Cong., 2d Sess., 168 (1980). In fact, the average wellhead prices of domestically produced crude oil in the United States have been: 1980 - $21.59; 1981 - $31.77; 1982 - $28.52. Energy Information Admin., Monthly Energy Review, March 31, 1983, at 88. Prices early 1983 have declined further, to approximately $26.50. IPAA, Wholesale Price Report. Current prices thus only slightly exceed *half* what Congress expected the price level to be in 1983.

final, temporary but not yet proposed as final, or in dispute. To date there have been 48 separate notices published in the *Federal Register* regarding proposed rules, temporary rules, solicitations for public comment, public hearings on proposed rules, and corrections, clarifications, or amendments of all of the above. See Appendix B, *infra*. In addition, the list of revenue rulings, revenue procedures, general counsel memoranda, private letter rulings, and technical advice memoranda is massive.

One of the primary concepts that remains unsettled is the definition of the "property" from which the oil is removed. See, *e.g.*, Notice of March 1, 1983, Public Hearing on Proposed Regulation for Definition of Property, 48 Fed. Reg. 2800 (1983). Last year, the General Accounting Office found that:

> Being the basic determinate of tax tier, the property concept is the cornerstone of the windfall profit tax. As such, the definition and scope of the concept should be well established during the early stages of the windfall profit tax program. . . . There is, however, considerable uncertainty over various aspects of the property concept within both the IRS and the oil industry. Initial IRS examinations reflected inconsistent and inaccurate treatment of the property concept. . . . Uncertainty over the meaning of a cornerstone term promotes neither voluntary compliance nor effective IRS examinations. Thus, Treasury and IRS need to quickly resolve uncertainties over the property concept.[20]

In testimony to Congress concerning the difficulties in administering the windfall tax, the General Accounting Office stated the windfall tax reporting burden on first purchasers amounted to "a couple million pieces of paper a year." [21] The

[20] General Accounting Office, *Report to the Secretary of the Treasury, Uncertainties About the Definition and Scope of the Property Concept May Reduce Windfall Profit Tax Revenues* (1982).

[21] *IRS Administration of the Windfall Profit Tax and U.S. Geological Survey's Oil and Gas Royalty Collection Activities: Hearings*

GAO description of the burden on the Internal Revenue Service was even more illustrative:

> In February 1981, IRS estimated that it would spend 877 staff years and $20 million in Fiscal Year 1981, and 1,056 staff years and $24 million in Fiscal Year 1982, to administer the [windfall profit] tax. These resources must be diverted from other IRS programs and, as a result, other programs will suffer. The diverted staff years themselves, while significant in number, understate if anything the impact of the reassignments on IRS' other programs since it will be drawing on its more experienced and skilled employees to deal with these complex matters.[22]

In examining the burdens imposed by the windfall tax and the inequalities created by the Alaska exemption, it is also illustrative to note that the costs of production in other parts of the United States can rival those in Alaska.[23] Particularly informative testimony was presented by the Commissioner of Revenue for the State of Alaska. He praised the proposal to exempt Arctic production, but urged that it be expanded to other high cost production, including areas outside of Alaska:

> [W]hile [the tax] prudently exempts Arctic production to provide an incentive for development, *it fails to do so for other areas with comparably high costs and risks.* In the deep-water OCS off Louisiana, a single production platform may run into hundreds of millions of dollars. One

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*Before a Subcomm. of the Comm. on Government Operations*, 97th Cong., 1st Sess. 13 (1981)(Testimony of William J. Anderson, Director, General Government Division, U.S. General Accounting Office). See also Wall Street Journal, April 22, 1981, at 1, col. 5.

[22] *Id.* at 5.

[23] These production cost figures are offered for illustrative purposes only. Whether or not Congress had a rational basis for treating Alaskan oil production differently from other oil production is not a relevant issue. The Uniformity Clause does not contain an exception allowing non-uniformity whenever Congress may be able to discern some difference between two regions. See Taxpayers and Associations Mot. to Aff. 9-12; Louisiana Mot. to Aff. 9-14.

> exploratory well in the Baltimore Canyon may cost over $20 million, while a well in the Gulf of Alaska can easily be even more expensive.[24]

In debates on amendments to the Act, it was observed that the costs of drilling in onshore areas of the "Lower 48" are approximately $1 million for a 10,000 foot well and $10 million for a 20,000 foot well.[25] These drilling costs have increased over 350 percent since 1970. 127 Cong. Rec. S8069 (daily ed. July 21, 1981) (remarks of Sen. Bentsen). Senator Wallop pointed out, "[I]n the Overthrust Belt, wells that were once on an average 2,000 to 4,000 feet, and costing in the neighborhood of a half million dollars, now go to 12,000 to 17,000 feet and costing in the neighborhood of $4 million."[26] These expense figures must be evaluated in light of the fact that about nine of every ten wells are non-producing dry holes. 127 Cong. Rec. S8952 (daily ed. July 31, 1981) (remarks of Sen. Dole).

It is an unfortunate but hard fact that even though revenues generated by the tax are declining, the cost of administration, both to the industry and to the Treasury Department, remains essentially constant at an inordinately high level. The process of producing oil remains expensive throughout the nation. The drastic downward revisions in the projected revenues to be generated by the tax highlight the urgency and correctness of providing Congress an opportunity to reexamine the issue, to assess whether the Tax's administrative burdens and production disincentives are justified.

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[24] *Crude Oil Tax: Hearings on H.R. 3919 Before the Senate Comm. on Finance*, 96th Cong., 1st Sess., 916 (1979) (statement of Thomas K. Williams, Commissioner of Revenue, State of Alaska).

[25] S. Rep. No. 144, 97th Cong., 1st Sess., 186 (1981) (additional views of Senators Bentsen and Boren); 127 Cong. Rec. S8068-69 (daily ed. July 21, 1981) (remarks of Sen. Bentsen).

[26] 127 Cong. Rec. S8088 (daily ed. July 21, 1981). See also *Crude Oil Tax: Hearings on H.R. 3919 Before the Senate Comm. on Finance*, 96th Cong., 1st Sess., 400-01 (1979) (statement of E. L. Williamson, President, Louisiana Land and Exploration Co.).

### D. The Windfall Tax Is an Excise Tax on Oil Production; It is Not a Tax on "Windfall Profits."

The Government offers a strained interpretation of the windfall tax in an attempt to avoid its lack of geographic uniformity. Rather than taxing oil production, the government contends: "[T]he subject of the windfall profit tax is the 'windfall profit' derived from oil production." (Gov. Br. 18.) Based on this view of the tax, the Government asserts the requirement of geographic uniformity is satisfied since windfall profits are taxed wherever they exist. It contends that because of high production costs, windfall profits do not exist in the exempt area of Alaska, but (presumably) do exist in every other area of the United States, and thus the tax has the practical effect of uniform operation. (Gov. Br. 19, 28.) However, this assertion runs afoul of the historical characteristics of excise taxation, the legislative history of the windfall tax, and the structure of the Act.

In Section 4986(a), Congress expressly declared its intent to create an excise tax, and this congressional assertion is entitled to judicial deference. See *Spreckels Sugar Refining Co.* v. *McClain*, 192 U.S. 397, 401-02 (1904). A profit, windfall or not, is not a proper subject for an *excise* tax. Congress's constant statements that it was establishing an *excise* tax thus contradict the Government's assertions that Congress meant to create something different—a tax on profits.[27]

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[27] The Conference Committee Report states, "The windfall profit tax is a temporary excise, or severance, tax applying to domestically produced crude oil." Similar statements appear in the House and Senate committee reports. H. Rep. No. 304, 96th Cong., 1st Sess. 43 (1979); S. Rep. No. 394, 96th Cong., 1st Sess. 2, 29 (1979). H. Rep. No. 817, 96th Cong., 2d Sess., 92 (1980). The analogy to severance taxation further serves to clarify congressional intent. Severance taxes are usually imposed as a fixed percentage of the value of the product severed or, in the case of oil, on a flat rate per barrel. 2 CCH State Tax Guide ¶ 45-000 (2d ed.). See, *Commonwealth Edison Co.*

To the extent the profit from a transaction is used in determining excise liability, it is merely part of the mechanical process of measuring the amount of tax on a taxable right, privilege, or event.[28] Thus, in the present case, the "windfall profit" is merely one element in the formula for computing the excise tax. The "windfall profit" is the *measure* of the tax, crude oil production is the *subject* of taxation. This conclusion is strongly reinforced by the fact the windfall profit is not a "profit" as that term is ordinarily understood. It is a creature of the statute, totally unrelated to actual profits.[29]

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v. *Montana*, 453 U.S. 609, 612 (1981) (Montana tax levied on "contract sales price" of coal labelled as severance tax). Severance taxes do not ordinarily take into account whether mineral production resulted in a gain or loss to the producer.

[28] For example, in *Nicol* v. *Ames*, 173 U.S. 509, 519 (1899), the Court determined that an excise tax levied on sales at business exchanges was a tax "upon the privilege, opportunity or facility" and was "not laid upon the property at all, nor upon the profits of the sale thereof." Accord, *Bromley* v. *McCaughn*, 280 U.S. 124, 136 (1929); *Pollock* v. *Farmers' Loan and Trust Co.*, 157 U.S. 429 (1895), on rehearing, 158 U.S. 601 (1895); *Indian Motocycle Co.* v. *United States*, 283 U.S. 570, 574 (1929).

[29] The common idea of huge "windfall profits" accruing to the oil industry was entirely fallacious. Although the oil industry enjoyed a brief surge in profits in 1974-75, its long-term profit margin was hardly spectacular. A Citibank study found that oil company profits for 1968-78 were 13.9 percent, compared to 13.7 percent for total manufacturing. H. Rep. No. 304, 96th Cong., 1st Sess., 83 (1979) (Minority Views of Rep. Conable, *et al.*). A similar study by the Chase Manhattan Bank and Securities and Exchange Commission found that the oil industry's 10.8 percent profits for 1955-77 compared with 11.4 percent for all manufacturing. *Windfall Profits Tax and Energy Trust Fund: Hearings Before the Committee on Ways and Means, House of Representatives*, 96th Cong., 1st Sess. 622, 695 (1979). See also Saterdal and Marks, *Oil Industry Profits—Perception vs. Reality*, Mines Magazine 5 (March 1980). Since passage of the windfall tax, as a result of lower oil prices, general economic trends, and of the tax, the oil industry has experienced an

The Government's mistaken identification of the subject of taxation is also revealed by Congress's failure to consistently account for "differences in 'windfall profit.' " (Gov. Br. 18.) The Government asserts that Congress categorized oil for windfall taxation based not upon differences in the physical character and quality of the oil itself, but upon differences in profit margins. This assertion conveniently overlooks many exceptions. For example, several classifications are based not on the "windfall profit" but upon who owns the oil, *e.g.*, state and local governments, Section 4994(a), certain Indian tribes, Section 4994(d), National Petroleum Reserve Oil[30] and "front-end tertiary oil."[31]

Other exceptions disproving the Government's asserted concern with differences in profit margins are found in the windfall tax Conference Report. Several oil classifications are described which, under the standards urged by the Government, clearly are distinguishable by their lack of so-called "windfall profit" rather than their physical properties—but which Congress refused to afford special treatment. These include: (1) high watercut oil, *i.e.*, oil which can only be pro-

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economic decline. The number of drilling rigs in operation has declined by over half, from 4,530 at the end of 1981 to a current low of 1,956. Petroleum Information, *Energy Information*, June 14, 1982, at 4, and April 4, 1983, at 3.

[30] Section 4991(b). National Petroleum Reserve Oil is owned by the U.S. Government and produced from a Naval Petroleum Reserve.

[31] Section 4994. The front-end tertiary oil provisions are a perfect example of the extreme complexity and irrationality of the entire tax. Front-end tertiary oil does not mean, as one might expect, oil produced from a tertiary project. Instead, it is produced by ordinary means and is released from crude oil price controls if the owner thereof was an independent producer who owned a working interest in qualified tertiary property, 50 percent or more of the working interest in which was owned by persons who were independent producers for the last quarter of 1979. Sections 4993(d) and 4994(c).

duced in conjunction with water several times the volume of oil produced, (2) deep marginal oil, *i.e.*, oil produced from wells with average daily production in excess of the stripper well limit, but which are economically marginal due to the depth from which they are produced, and (3) Cook Inlet oil, *i.e.*, that produced in the Cook Inlet of Alaska.[32] H. Rep. No. 817, 96th Cong., 2d Sess., 92-93 (1980). In each of these cases, congressional analysis based on the presence or absence of windfall profits would have resulted in tax exemption or in extremely favorable tax treatment. These examples indicate that such a concern was not the overriding congressional motivation.

Specific provisions of the Act further clarify that the triggering event for imposition of the windfall tax is the removal of taxable crude oil. Section 4987 provides that the tax is imposed "with respect to any barrel of taxable crude oil." The tax is not imposed with respect to a windfall profit. Instead, the windfall profit forms the tax base. Section 4988 sets out the specific statutory formula defining the amount of "windfall profit." Windfall profit refers to the difference between the removal price of a barrel and the adjusted base price minus adjustments for state severance taxes. Section 4988(c) defines the removal price. If the oil is removed from the property where it is produced before sale (or under certain other circumstances), the tax is calculated using a constructive sale price. Section 4988(c)(3). Thus the oil may be taxed even when there is not yet

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[32] It is significant that most of the debate about the high cost of operations in Alaska centered on the Cook Inlet. This congressional debate was cited extensively by the Government in its trial court brief (Brief for the Defendant in Support of Its Motion for Summary Judgment 28-29) as justification for the "reasonableness" of Congress trampling roughshod upon the Uniformity Clause. The Cook Inlet is *not* within the exempt area. New production in Cook Inlet, although undertaken at the high costs cited in congressional debates, is subject to the same tax rates as the rest of the nation. See 125 Cong. Rec. S18109-10 (daily ed. Dec. 10, 1979) (remarks of Sen. Stevens), 125 Cong. Rec. S18111 (daily ed. Dec. 10, 1979) (remarks of Sen. Percy).

any "windfall profit." The event of removal of oil from the premises creates the occasion for the tax, not the event of receiving "windfall profits."

The Government's assertion that the tax is constitutional because it uniformly taxes "windfall profits" must be rejected. Analysis of the windfall tax and the underlying congressional intent reveal that the subject of taxation is production of crude oil. Since the excise tax is not imposed upon oil produced in most of Alaska, the windfall tax is not geographically uniform, and must therefore be declared unconstitutional.

The preceding discussions reveal that the windfall tax places a heavy burden on oil production in most of the nation, while favoring the same industry in another region. Even if the Government's assertion is correct that Alaskan production is more expensive than oil production in the Rocky Mountain Overthrust Belt, or Louisiana offshore areas, or California heavy oil areas, this does not justify the Alaska exemption from a constitutional perspective.

The Founding Fathers would not have endorsed preference for agriculture in New England merely because it was more risky and expensive than Southern agriculture. Likewise, the fact that oil can be produced more efficiently and less expensively in the "Lower 48" does not constitutionally justify penalizing those who have invested in more efficient production. The Founding Fathers viewed this type of regional favoritism as so destructive to the Union that it was specifically prohibited in the Constitution. The Alaska exemption violates this constitutional safeguard.

## II. THE UNCONSTITUTIONALITY OF THE WINDFALL TAX ACT REQUIRES THAT THE TAX AS A WHOLE BE INVALIDATED.

The proper remedy for the unconstitutional lack of uniformity in Title I of the Crude Oil Windfall Profit Tax Act is to strike the invalid tax in its entirety. The legislative history of the windfall tax compels this conclusion and shows not only that

the Alaska exemption played a central role in reconciling competing policies and political forces, but that the Act, if passed at all, would have emerged far differently absent non-uniform tax treatment for Alaska. Such a conclusion is also compelled by sound precedent, which demonstrates that the Internal Revenue Code's separability clause, Section 7852(a), requires invalidation of the tax. Failure to strike the tax would deny taxpayers a meaningful remedy for unconstitutional taxation.

In the following section, the association appellees will again focus on those issues that may be particularly illuminated by their unique perspective.[33] The associations will illustrate that it is not possible to simply delete the unconstitutional provisions from the Act, because to do so would create significant inconsistencies in its structure. The associations will also clarify one common misconception, *i.e.*, that the windfall tax was enacted as one component of the decontrol of crude oil prices. Finally, the associations will discuss the reasons that the Court should refrain from grappling with the major policy questions raised by expanding the application of the windfall tax and should instead allow Congress to resolve these issues.

### A. It Is Not Feasible to Simply Sever the Alaska Exemption Provisions; Extending the Windfall Tax to Alaska Would Create Inconsistencies and Unfairness in the Operation of the Act.

Merely eliminating the few statutory sections describing the Alaska exemption from the Act would fall far short of resolving the difficulties created by the exemption. The complex structure of the Act does not allow such simple surgery. Extending

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[33] The legislative history of the windfall tax and separability case law are analyzed extensively in the briefs of the taxpayer appellees and the States of Texas and Louisiana. See also Drapkin & Verleger, *The Windfall Profit Tax: Origins, Development, Implications*, 22 B.C.L. Rev. 635 (1981).

the tax to Alaska would require the Court to either impose a tax that in some respects operates unfairly, irrationally, or contrary to congressional intent—or to rewrite portions of the Act. The latter alternative has been squarely rejected by this Court. *Marchetti* v. *United States*, 390 U.S. 39, 60 (1968); *Blount* v. *Rizzo*, 400 U.S. 410, 419 (1971). The former alternative is similarly unattractive.

Extending the windfall tax as it currently exists would create many practical and procedural difficulties. For example, given the importance of the Alaska exemption to the Senate's acceptance of *any* tax on new oil[34] and the Congress's subsequent reduction of the rate of tax on new oil, Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, Section 602(a), 95 Stat. 172, 337, the Court might have to decide at what rate Congress would have taxed new oil had it not exempted Alaskan oil. Since the version of the windfall tax bill originally considered by the Senate would have exempted *all* newly discovered oil, S. Rep. No. 394, 96th Cong., 1st Sess., 42-43 (1979), it is possible Congress would have preferred a complete newly discovered oil exemption to taxing Alaskan production. See 127 Cong. Rec. S8084 (daily ed. July 21, 1981)(remarks of Sen. Dole).

The "sunset" provision of the Act dramatically demonstrates an inconsistency that would result from judicial extension of the tax to previously exempt areas. The windfall tax is scheduled to begin phasing out over a 33-month period whenever the tax revenues exceed \$227.3 billion.[35] A decision to eliminate the

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[34] Steps leading to the Senate's crucial compromise on the Alaska exemption are described in the Taxpayers and Associations Motion to Affirm at 23-28.

[35] Each producer's tax is reduced by 3 percent for each month starting with the later of January 1988 or the first month (but not later than January 1991) after the Secretary of Treasury determines the aggregate net windfall tax revenue will exceed \$227.3 billion. Section 4990. See H. Rep. No. 817, 96th Cong., 2d Sess. 116 (1980).

Alaska exemption would increase the amount of revenue collected by the tax. This raises the question of whether the Court must increase the target revenue amount, $227.3 billion, required to terminate the tax. Although, as noted *supra* at pp. 16-20, the price for oil and consequent windfall tax revenues have been below those originally projected, if oil prices prove to be as unpredictable in the coming years as in the past three years, the current low tax revenues cannot be entirely depended upon to rectify the problem. If the Court leaves the $227.3 billion ceiling intact, and higher prices and the expanded tax base cause the tax to terminate prior to January 1991, the law will leave untaxed certain non-exempt crude oil Congress intended to tax, and overtax Alaskan oil Congress decided not to burden.

The total exemption of certain Alaskan oil was not the only congressional differentiation between North Slope oil and other oil. Between 1980 and 1982, Section 4996(d) treated non-exempt Sadlerochit oil differently from other tier one oil, due to effects of the Trans-Alaska Pipeline System tariff upon the wellhead price of Alaskan oil. See H. Rep. No. 817, 96th Cong., 2d Sess. 103 (1980). This special treatment was eliminated by the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324, Section 284. If the Court strikes down the Alaska exemption retroactively, it will have to decide whether the now taxable tier three Alaskan oil is entitled to the more favorable treatment previously granted Sadlerochit oil (since new Alaskan oil would also be transported through the Trans-Alaska Pipeline System) or whether new Alaskan oil would be treated the same as non-Alaskan tier three oil.

Another inconsistency created by the Trans-Alaska Pipeline System adjustment provision remains despite Section 4996(d)'s amendment. The removal price of Sadlerochit oil is to be determined on a monthly average basis, Section 4996(d)(1), rather than on a per barrel basis as for other oil. Section 4988(a). This provision originated in the method of accounting used for transportation via the Trans-Alaska Pipeline System.

Since the current exempt production in Alaska is likewise transported through the pipeline, Brief *Amicus Curiae* of Atlantic Richfield at 23, the Court would have to decide whether Congress intended the provision to apply to all oil using the pipeline.

The Government suggests the tier three designation for newly discovered oil will automatically be applied to production in the exempt area of Alaska on the assumption all production in that area would qualify for newly discovered oil status. A Department of the Treasury notice of proposed rulemaking, 47 Fed. Reg. 50,306 (1982), suggests that proposed revisions in the definition of "commercial quantities" and other newly discovered oil concepts might impact such definitions for exempt Alaskan production.[36]

The foregoing examples are illustrative of the many interrelated provisions of the Act that must be considered in determining whether to extend the windfall tax to exempt areas of Alaska if it is found unconstitutional. The complexities caused by attempting to judicially redeem Congress's unconstitutional taxing scheme are further highlighted by examining the confusing array of alternative remedies offered by the Government: First, in the lower court, the Government argued that "the only possible extension of the Alaskan exemption that would not conflict with the intent of Congress would be to extend the exemption to production in all areas similar to the Arctic Circle or located more than 75 miles from a pipeline connection." Reply Brief for the Defendant United States of America and in Opposition to Motions for Summary Judgment at 10.

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[36] The preamble to the proposed revision to 26 C.F.R. Section 51, 4996-1 observes, "The regulations would provide guidance on the requirements for the qualification of crude oil as newly discovered oil, as well as a definition of 'commercial quantities' that affects . . . the exemption for Alaskan oil." 47 Fed. Reg. 50,306 (1982).

Second, in its brief on the merits before this Court, the Government indicates that an invalidation of the windfall tax should apply only to newly discovered oil, "because that is the only category of oil that is not taxed with absolute geographic uniformity." (Gov. Br. 12 n.15, 50 n.46.) Thus, the Government suggests, invalidating the tax imposed on tier three newly discovered oil, Section 4991(e), along with the Alaska exemption provisions, Sections 4991(b)(3) and 4994(e), would create absolute geographic uniformity and thereby resolve the constitutional problem.

Third, the Government's casual assertion that offshore Alaskan oil would not be subject to the Uniformity Clause (Gov. Br. 21 n.28) implies the Court can extend the tax to cover all Alaskan onshore production, with offshore production remaining exempt. Alternatively, the Government acknowledges that as a result of the Submerged Lands Act, 43 U.S.C. Sections 1301-1315 (Supp. IV 1980), oil produced less than three miles offshore might be under jurisdiction of the State of Alaska and therefore controlled by the unformity requirement. Thus the tax would be extended to include all Alaskan production except that more than three miles offshore. Finally, the Government's oft-repeated option, should the windfall tax be held unconstitutional, is to strike the Alaska exemption and thereby extend the tax to all production.

The process of choosing one of these alternative remedies will embroil the Court in the type of complex decisionmaking most appropriately left to Congress. The windfall tax should be stricken in its entirety. Congress can then, if it desires to enact substitute legislation, resolve the inconsistencies and choose a constitutionally permissible tax structure.

### B. The Windfall Tax Was Not Enacted as a Component of Oil Price Decontrol.

One common myth about congressional consideration of the windfall tax needs to be dispelled, *i.e.*, that "Congress enacted the windfall tax as an integral part of the decontrol of domestic oil pricing." (Gov. Br. 12). The windfall tax was not, in reality,

part of a "package deal" that included oil price decontrol. The decontrol process was well underway at the time the windfall tax was enacted.

Oil price controls originated in President Nixon's wage and price freeze on *all commodities* during 1971, imposed under the Economic Stabilization Act of 1970, Pub. L. No. 91-379, 84 Stat. 796. The price controls on oil continued long after similar controls on other products were abandoned.[37] The Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, 89 Stat. 871, provided for mandatory price controls on crude oil through May 1979 with presidential discretion for extension of controls through September 1981. In 1977 Congress rejected an attempt by President Carter to couple decontrol of crude oil prices with a tax on domestic crude oil.[38]

In April 1979—a full year prior to enactment of the windfall tax—President Carter announced his decision to exercise his discretionary authority to phase out price controls, because "Federal Government price controls now hold down our own production, and they encourage waste and increasing dependence on foreign oil."[39] At the President's direction, the Depart-

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[37] Oil controls were later maintained under authority of the Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 627. The discrepancy between oil and other commodities, so far as price controls are concerned, is that the producers of other goods and services became entitled to sell at market prices long before producers of oil. If there was a windfall from "decontrol," it accrued to people selling everything other than crude oil.

[38] President Carter's offered legislation was the National Energy Act, H.R. 6831, 95th Cong., 1st Sess. (1977), which coupled decontrol with a "Crude Oil Equalization Tax." The proposal died without being enacted when the 95th Congress adjourned. See 3 Staff of the Joint Committee on Taxation, 95th Cong., 1st Sess., *Section-by-Section Description of H.R. 6831, The Administration's Tax Proposals Relating to Energy*, 22-23 (Comm. Print 1977).

[39] President's Energy Address to the Nation, 15 Weekly Comp. of Pres. Doc. 609, 610 (April 5, 1979). Legislation to impose a windfall

ment of Energy implemented phased deregulation of crude oil prices by administrative order published November 12, 1979, to become effective January 1, 1980. The preamble to the final rule summarized the steps already taken to implement the President's decision to decontrol oil prices:

> As a result of these steps, producers may currently charge market prices for all production from properties which qualify as newly discovered properties (Executive Order No. 12,153, 44 Fed. Reg. 48,949, August 21, 1979). Market prices may also be received for the incremental production resulting from a tertiary project (43 Fed. Reg. 33,679, August 1, 1978). In addition, we have provided for the gradual conversion of most lower tier crude oil to upper tier crude oil by October 1, 1981 (44 Fed. Reg. 25,168, April 27, 1979).
>
> As the final step in the President's program, we propose amendments to the price regulations which provided for the gradual removal of ceiling prices for upper tier crude oil between January 1, 1980 and October 1, 1981 (44 Fed. Reg. 50,605, August 29, 1979).[40]

By the time the windfall tax was passed, decontrol had already spurred new investment in the energy industry. The number of drilling rigs in operation had grown to a 23-year high. U.S. News and World Report, April 7, 1980, at 71, 73.

The House Report confirms this separation between decontrol and the windfall tax: "While the windfall profit tax is

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profits tax was proposed shortly thereafter, but interestingly, the expected revenues from this tax were only $0.2 billion in fiscal year 1980, $1.3 billion in 1981, and $2.0 billion in 1982. Message to the Congress, 15 Weekly Comp. of Pres. Doc. 721, 726 (April 26, 1979).

[40] Final Rule on Phased Deregulation of Upper Tier Crude Oil, 44 Fed. Reg. 66,186-87 (1979). It was this phased decontrol program which was brought to a conclusion in one step by President Reagan's issuance of Executive Order 12,287, 46 Fed. Reg. 9909, on January 28, 1981.

structured to be consistent with the proposed deregulation of crude oil prices, it is not contingent on decontrol and will apply even if some form of price controls is continued or reimposed." H. Rep. No. 304, 96th Cong., 1st Sess. 3 (1979).[41] The decontrol of domestic crude oil pricing was thus independent from imposition of a windfall tax. The Government's attempt to infer that decontrol depended upon enactment of a windfall tax must be rejected.

### C. Sound Policy and Precedent Demonstrate That Congress Should Be Given the Opportunity to Start Afresh.

Courts have traditionally evidenced a reluctance to enter into the realm of policymaking where decisions require a careful weighing of competing values. The instant case presents issues that epitomize the critical, complex policy judgments peculiarly within the province of the legislature. Striking down the entire Act would prompt Congress to reevaluate the windfall tax to determine whether—in light of the tax's strong disincentives for oil production, the decline in expected revenues, and the complex administrative requirements that have befuddled federal tax collectors as well as private taxpayers—the Act should be reenacted without the Alaska exemption.

It is not the responsibility of the judiciary to rectify congressional violations of the Constitution by exercising the legislative taxing power. Under the appropriate judicial test, enunciated as recently as last year in *Zobel* v. *Williams*, 102 S.

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[41] Both the House and Senate committee reports on the windfall tax indicate it was as much a response to high world oil prices, determined by OPEC suppliers, as to decontrol. H. Rep. No. 304, 96th Cong., 1st Sess. 2 (1979); S. Rep. No. 394, 96th Cong., 1st Sess. 6, 27 (1979). The Act did not, however, impose a tax on oil produced in foreign countries and imported into the United States. Only domestically produced oil is subject to the windfall tax. Sections 4991(a), 4996(b)(3).

Ct. 2309, 2315 (1982), if it is evident Congress would not have passed the bill without the invalid portion, then the appropriate remedy is to strike down the entire measure and send it back to Congress to enact proper legislation. Since, as the district court concluded, the tax would not have passed in any recognizable form without the Alaska compromise (J.S. App. 9a), the proper remedy is to invalidate the tax as a whole.

The Alaska exemption was a necessary and integral compromise in the windfall tax balance between raising tax revenues and increasing domestic production. Every form of the windfall tax considered by the House and Senate as well as President Carter's original proposal contained an Alaska exemption of one form or another. In fact, the original bill contained none of the traditional tax exemptions for charitable institutions or state and local governments—its *only* exemption was for Alaskan oil.[42] Every subsequent piece of legislation either contained a specific Alaska exemption[43] or exempted all newly discovered oil, including Alaskan oil.[44] From its inception, the windfall tax was based on an unconstitutional foundation.

Every legislative session following adoption of the windfall tax has witnessed substantial retreats from the original scope of the tax. In 1980, Congress allowed a $1000 tax credit for royalty owners. Pub. L. No. 96-499, Section 1131(a)(1), 94 Stat. 2691 (1980). The Economic Recovery Tax Act of 1981,

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[42] Reese and Black, *Comparative Analysis of Tax-Exempt Status for Federal Income and Windfall Profit Taxation*, in D. Crumbley and C. Reese, *Readings in the Crude Oil Windfall Profit Tax* 161, 196 (1982); The Crude Oil Windfall Profit Tax Bill of 1979, H.R. 3919, 96th Cong., 1st Sess., introduced May 3, 1979.

[43] H. Rep. No. 304, 96th Cong., 1st Sess. 30-31 (1980); 125 Cong. Rec. S18564-67 (daily ed. Dec. 14, 1979); H. Rep. No. 817, 96th Cong., 2d Sess. 102-03 (1980).

[44] S. Rep. No. 394, 96th Cong., 1st Sess. 42-43 (1979).

Pub. L. No. 97-34, 95 Stat. 172, provided expanded relief for royalty owners, exempted stripper well production by independent producers, and reduced the tax rate on newly discovered oil. Only one amendment increased tax revenues. Tax Equity and Fiscal Responsibility Act of 1982, Section 284, Pub. L. No. 97-248, 96 Stat. 324, 569.

The issue of taxation is one where this Court has expressed particular reluctance to substitute its judgment for that of Congress. "In this area of limitless factual variations, 'it is the province of Congress and the Commissioner, not the courts, to make the appropriate adjustments.' " *Bingler* v. *Johnson*, 394 U.S. 741, 751 (1969), quoting *United States* v. *Correll*, 389 U.S. 299, 307 (1968).

This Court's general concerns in determining whether to invalidate an unacceptable tax in full or in part are set forth in *Marchetti* v. *United States*, 390 U.S. 39 (1968). The Court notes, first, that although it is obliged to give full recognition to congressional taxing powers, "we are equally obliged to give full effect to the constitutional restrictions which attend the exercise of those powers." 390 U.S. at 58. Furthermore, where the unconstitutionality of one aspect of the tax would preclude a significant congressional purpose in enacting the legislation and where the will of Congress in balancing the remaining policies is unclear, the Court should return the decisionmaking to Congress: "[T]he Constitution has entrusted to Congress, and not to this Court, the task of striking an appropriate balance among such values." *Id.* at 60.[45] Such concerns are particularly relevant where, as here, there is no explicit direc-

[45] See also *Blount* v. *Rizzo*, 400 U.S. 410, 419 (1971); *District of Columbia National Bank* v. *District of Columbia*, 348 F.2d 808, 810 (D.C. Cir. 1965) ("It is not the function of the courts to upset the balances among interests deliberately arrived at by the legislature, for that choice is a legislative and not a judicial one . . . ."); The Federalist No. 78, at 467, 479-71 (Mentor ed. 1961).

tion from Congress respecting what it wanted done in the event the tax was found unconstitutional.[46]

The wisdom of the separation of powers, especially in the realm of taxation, becomes apparent if the Court considers its own limitations in amassing the economic and statistical information necessary for balancing complex energy policy factors and formulating an acceptable new windfall tax. Congress debated the windfall tax and its predecessor tax proposals for almost three years.[47] In the two years following enactment of the tax, Congress considered and adopted amendments further refining the balance embodied in the tax.[48] These extensive legislative deliberations cannot, of course, be duplicated in a judicial setting. It is thus institutionally wrong for the Court to "enact" a tax Congress did not pass.

Congress continues to contend with the political and economic forces that alter the appropriate balance of energy production incentives and taxation. An overriding concern in recent legislative sessions has been eliminating disincentives for new oil production.[49] The economic situation in the energy industry is far different today than it was when the windfall

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[46] Senator Long's isolated comment, 126 Cong. Rec. S3056 (daily ed. March 26, 1980), relied upon by the Government, is not determinative. If anything, Senator Long's comment read in its entirety shows Congress would not have enacted the tax without the Alaska exemption. For a fuller explanation, see Taxpayers and Associations Mot. to Aff. 27-28; Louisiana Mot. to Aff. 18-19.

[47] The National Energy Act, H.R. 6831, 95th Cong., 1st Sess. (1977) (proposing the "Crude Oil Equalization Tax"), was introduced in May 1977. The windfall tax was enacted in April 1980.

[48] Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172; Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, Section 284, 96 Stat. 324, 569.

[49] S. Rep. No. 144, 97th Cong., 1st Sess. 96 (1981). 127 Cong. Rec. S8084 (daily ed. July 21, 1981) (remarks of Senators Dole and Boren); 127 Cong. Rec. S8088 (daily ed. July 21, 1981) (remarks of Sen. Wallop).

profit tax was originally adopted. The price of oil has fallen far below the levels expected by Congress. The windfall tax has raised far less than the amounts predicted. See section I.C., *supra*.

Sound policy and precedent demonstrate that Congress should be given the opportunity to start afresh, particularly since recent oil price declines have proven the invalidity of basic assumptions underlying the windfall tax. Congress has a broad range of alternatives from which to select. Congress might elect to adopt a totally different tax or a totally different exemption or no tax at all. (Gov. Br. 12 n.15). With the wisdom gained from having observed the futile attempts of the Internal Revenue Service and oil producers to understand and implement the exceedingly complex structure of the tax, Congress might well decide to adopt a much more simplified tax. Having observed the significantly decreased revenues resulting from the combination of declining oil prices and the unique design of the tax, Congress might adopt a tax designed to raise a certain level of revenue regardless of oil price fluctuations. Under any circumstances it is clear the Court cannot know what Congress would have done initially or would do now. It is equally clear there are compelling reasons for providing Congress an opportunity to reconsider its objectives and the means chosen to achieve those objectives.

## CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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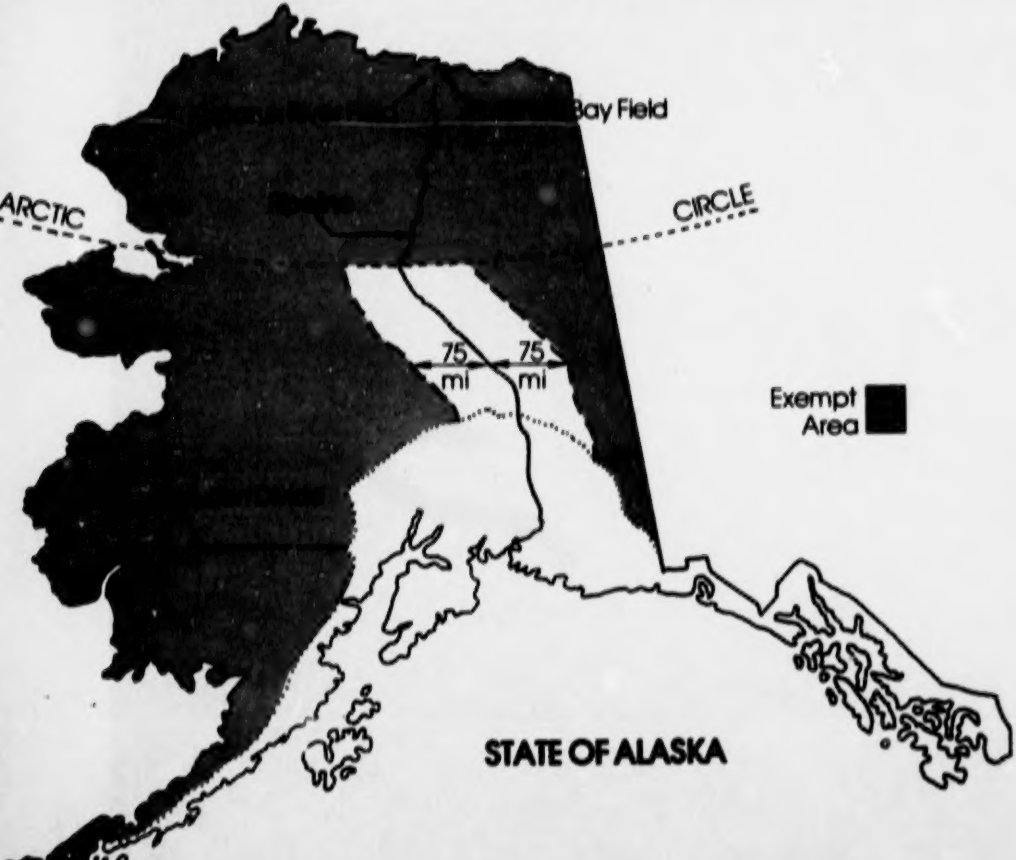
April 1983

# APPENDIX A


Bay Field
ARCTIC
CIRCLE
75
mi
75
mi
Exempt
Area
STATE OF ALASKA

# APPENDIX B

## FEDERAL REGISTER NOTICES RESPECTING THE WINDFALL PROFIT TAX

| January-December 1980 | January-December 1981 |
|---|---|
| 45 FR 203-205 | 46 FR 4873-88 |
| 45 FR 23384-99 | 46 FR 11284 |
| 45 FR 23400 | 46 FR 16257 |
| 45 FR 81606 | 46 FR 19935 |
| 45 FR 80551-53 | 46 FR 52334-39 |
| 45 FR 80554-55 | 46 FR 13509-11 |
| 45 FR 34899 | 46 FR 4950-51 |
| 45 FR 73512 | 46 FR 11292 |
| 45 FR 63297 | 46 FR 11947 |
| 45 FR 64603-604 | 46 FR 26660-61 |
| 45 FR 75231 | 46 FR 1754-58 |
| 45 FR 27953 | 46 FR 13525-26 |
| 45 FR 81561-63 | 46 FR 24595-96 |
| 45 FR 27929-33 | 46 FR 3560-61 |
| 45 FR 73467-71 | 46 FR 21307 |
| 45 FR 64574-78 | |
| 45 FR 78119 | |
| 45 FR 75206-208 | |
| 45 FR 63263-64 | |

January-December 1982

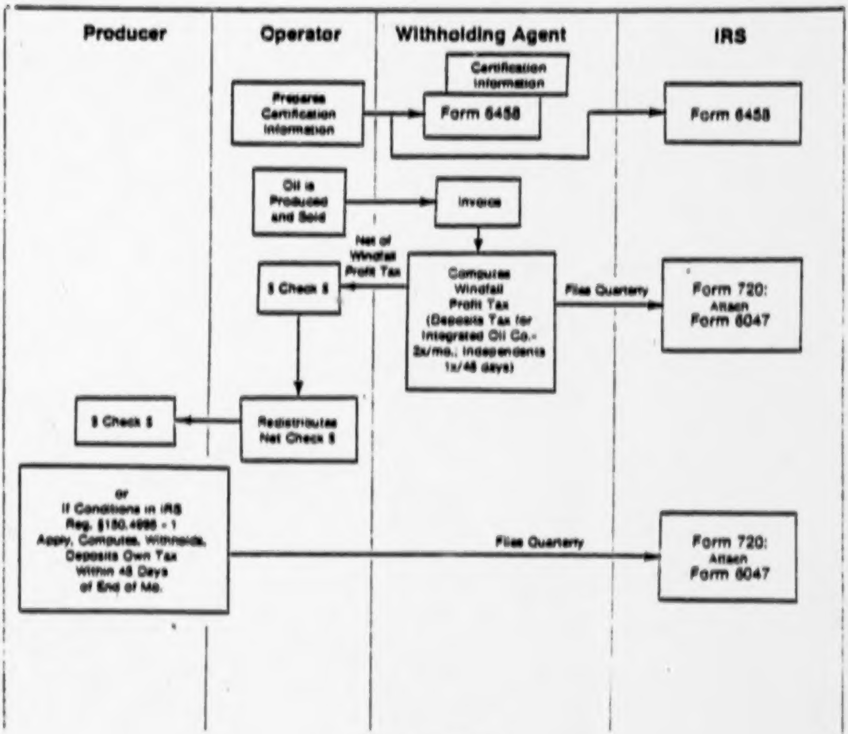
47 FR 50215-17
47 FR 8995-97
47 FR 50858-59
47 FR 50924-25
47 FR 9018
47 FR 50306-507

January-December 1983

48 FR 794
48 FR 1762-64
48 FR 1711-12
48 FR 2552-55
48 FR 2800-801
48 FR 3970
48 FR 5280
48 FR 10645

# APPENDIX C

## THE WINDFALL PROFIT TAX PROCESS

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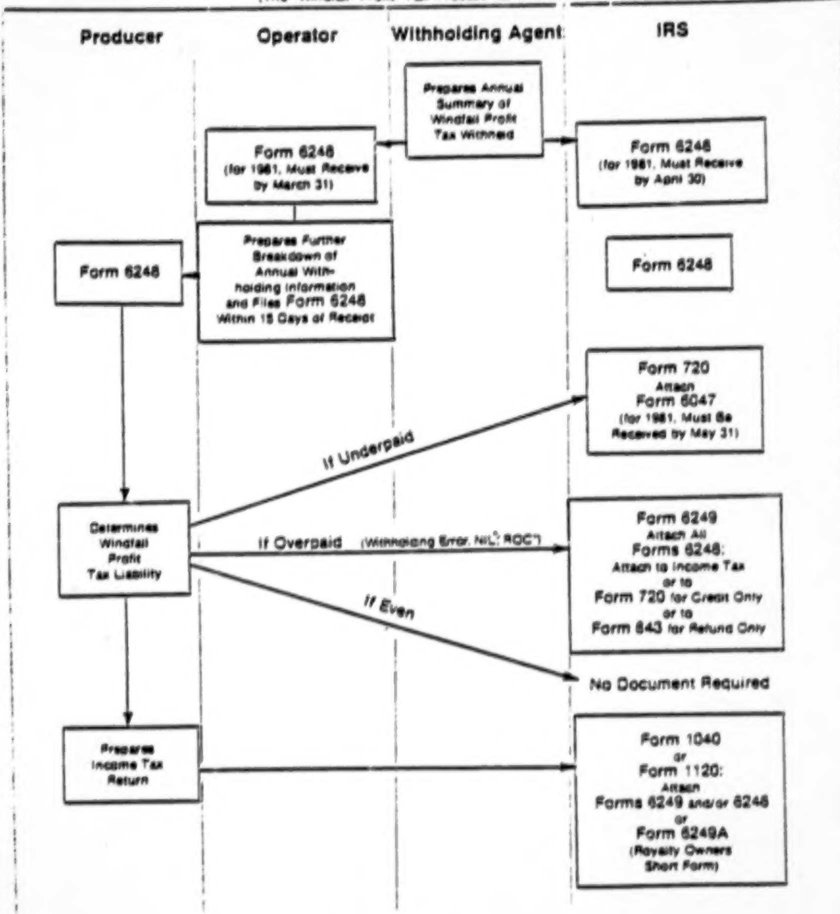
(The Windfall Profit Tax Process continued)




Source: "Prepared Statement," William J. Anderson, Director, General Government Division, GAO, April 13, 1981, before House Subcommittee on Commerce, Consumer, and Monetary Affairs, Committee on Government Operations.

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* Net Income Limitation, Royalty Owners' Credit.

No. 82-1066



# In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, APPELLANT

*v.*

HARRY PTASYNSKI, ET AL.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING*

## REPLY BRIEF FOR THE UNITED STATES

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# In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1066

UNITED STATES OF AMERICA, APPELLANT

*v.*

HARRY PTASYNSKI, ET AL.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING*

## REPLY BRIEF FOR THE UNITED STATES

### I. THE WINDFALL PROFIT TAX DOES NOT VIOLATE THE UNIFORMITY CLAUSE OF THE CONSTITUTION

1. In urging that the windfall profit tax violates the Uniformity Clause of the Constitution because of Congress' exclusion of certain geographically defined categories of Alaskan oil, appellees' argument rests upon two fundamental errors. First, they mistakenly assume that the windfall profit tax is levied on all domestic oil production. That, however, is not the case. Congress has imposed the tax only upon the windfall profits accruing from the decontrol of domestic oil prices and has defined windfall profit in a manner designed to encourage the continued exploration for and development of domestic oil.

Second, they erroneously assume that the Uniformity Clause absolutely prohibits Congress from defining the subject of a tax (or tax exemptions) in a manner that explicitly takes geographic considerations into account. But there is no basis in the decisions of this Court for the inflexible interpretation of the Uniformity Clause advanced by appellees. Article I, Section 8, Clause 1 prescribes that "Duties, Imposts and Excises shall be uniform throughout the United States." It was established, however, at the very outset that the Uniformity Clause does not prohibit Congress from drawing tax classifications that recognize that the subject of the tax may exist only within particular geographic areas. Thus, in the *Head Money Cases*, 112 U.S. 580 (1884), the analysis of which was most recently reaffirmed in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 159 (1974), the Court upheld a tax on companies transporting foreign passengers entering the United States by vessel. In so ruling, the Court rejected the contention that the tax violated the Uniformity Clause because by its terms, it could apply only in states having sea ports and not in landlocked states. The Court noted that "the evil to be remedied by this legislation" did not exist on the inland borders, and that "substantial uniformity within the meaning and purpose of the Constitution" was achieved by the uniform application of the statute in those quarters in which that "evil" was found to exist. 112 U.S. at 595.

The rationale of the *Head Money Cases* would not be changed by an attempt to portray the tax in that case as "the result of actions by a combination of states [the landlocked states] which strike at the vital interests of a minority of states [the coastal states]" (Ass'n Br. 10; see also Taxpayer Br. 20). The Uni-

formity Clause does not countermand the principle that majorities (however constituted), rather than minorities, are to prevail in the legislative process. So long as all persons similarly situated with respect to the subject of a federal tax are similarly treated, regardless of geographic location, the Uniformity Clause is satisfied.[1]

Here, the subject of the tax in question is the windfall profit accruing to oil producers as a result of the decontrol of domestic oil prices. In structuring the tax, Congress established a system of three tiers which was designed to encourage new oil production by taxing "newly discovered oil" at the most favorable rate. Conversely, Congress determined that the windfall profit would be greatest with respect to certain categories of old oil, where the producer would stand to gain a "windfall" from the sudden increase in prices caused by decontrol. Finally, in enacting the tax, Congress concluded that no windfall profit would accrue to the producers of oil located within certain geographically-defined areas on the "North Slope" of Alaska, and offshore oil that might be located on the Outer Continental Shelf adjacent to the North Slope. As the legislative history makes clear, the basis for Congress' conclusion is undisputed, viz., that the remote location, fragile environment, and extreme climatic conditions subjected the production of North Slope oil to risks and costs far greater than the

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[1] Similarly, even if the association appellees (Br. 13) and taxpayer appellees (Br. 32-33) are correct in describing the role of Senator Stevens of Alaska in permitting consideration of the bill (see pp. 14-15, *infra*), there is no impropriety in a Senator's efforts to persuade his colleagues that differences in circumstances exist within his state that warrant a difference in tax treatment.

risks and costs of developing domestic oil properties elsewhere. Thus, in determining that no windfall profit would occur with respect to North Slope oil, Congress sought to encourage continued oil exploration in these then-undeveloped areas.[2]

Viewed in this perspective, it is clear that the windfall profit tax meets the standard of the *Head Money Cases*, *supra*, 112 U.S. at 594, that a "tax is uniform when it operates with the same force and effect in every place where the subject of it is found." Here, the subject of the tax is windfall profit, and Congress has taxed such profits in every place where it has determined them to exist. However, its study of the domestic oil industry led it to conclude that there would be no windfall profit from oil production on the North Slope of Alaska. Indeed, the three-tier system established by the statute demonstrates that Congress believed that windfall profits would exist in varying amounts and degrees depending upon the particular type of oil sold. Hence, the exclusion of certain geographically-defined categories of Alaskan oil is equivalent to the creation of a "fourth tier" of oil that falls outside the compass of the windfall profit levy because of the absence of windfall profits.[3]

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[2] Despite the title of the tax and the extensive legislative history described in our opening brief (at 18-23), appellees argue (Ass'n Br. 2, 22; Taxpayer Br. 1 n.1) that the windfall profit tax is unrelated to profits. But Congress reasonably assumed that the increase in prices caused by decontrol would constitute profits. See also Section 4988(b) (26 U.S.C.), which limits the tax to an amount not exceeding 90% of the net income attributable to the oil in question.

[3] *Downes* v. *Bidwell*, 182 U.S. 244 (1901), upon which appellees rely (Taxpayer Br. 14), is distinguishable. There, the Court upheld a duty upon the importation of all goods from Puerto Rico. Although it appears that the Court re-

2. In exempting North Slope oil from the windfall profit tax, Congress did not, as appellees contend (Ass'n Br. 5, 8, 21; Taxpayer Br. 2, 7, 10, 21), "entirely exempt" three-fourths of the land area of Alaska from a tax that is imposed elsewhere. Such a characterization is misleading given the fact that there is no oil production whatsoever in the vast majority of the land within the geographically defined exempt area of Alaska. Moreover, as we pointed out in our opening brief (at 20-23), the bulk of Alaskan oil production within the exempt area is Sadlerochit oil, which is taxed at the highest rate provided for by the statute. Thus, the exemption applies only to "newly discovered oil" that might be produced within the designated area.[4] Hence, the fact that a substan-

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garded such a tax as not uniform insofar as it applied only to goods imported from Puerto Rico, the Court sustained the tax on the ground that Puerto Rico was not part of the United States. Here, however, the tax is not levied on all goods (or even any commodity) from a particular region nor does it exempt all goods (or any commodity) from a particular region. To the contrary, the tax is levied in every place throughout the United States in which Congress has determined that windfall profits would result from decontrol of domestic oil prices. Hence, the tax is uniform within the meaning of the Uniformity Clause.

[4] As the amicus brief filed by the State of Alaska points out (at 5), exempt production from the Kuparuk field is now approximately 100,000 barrels per day. In marked contrast, the daily production of taxable Sadlerochit oil is currently 1,530,000 barrels, and that production alone exceeds the production of any other state except Texas. Only about five percent of Alaska's total production is exempt under the provisions here in question (*id.* at 7). There is a long lead time required to develop any newly discovered areas. For example, 12 years had elapsed from the time oil was discovered in the

tial portion of the overall tax liability is imposed on Alaskan production effectively refutes appellees' charge that the exemption at issue represents the regional favoritism that the Founders sought to prevent by the Uniformity Clause. Indeed, the fact that the overwhelming portion of Alaskan production bears a substantial windfall profit tax liability convincingly demonstrates that the tax is imposed only on windfall profits and that it is uniformly applied with respect to every place where Congress determined such windfall profits to exist.

Accordingly, we have no quarrel with the taxpayer appellees' characterization (Br. 12) that the Uniformity Clause requires Congress to consider excise tax issues in terms of "policy rather than naked political power." In seeking to tax windfall profits arising from decontrol while continuing to encourage domestic oil production, Congress has done just that, viz., it has framed the definition of windfall profits in a manner designed to implement the national oil policy of taxing windfall profits arising from decontrol while encouraging new oil exploration and development. Nothing in the Uniformity Clause limits Congress' authority to define windfall profit arising from decontrol realistically and in a manner that seeks to promote the continued exploration and development of new oil sources.

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Kuparuk field until Atlantic Richfield began commercial production in December 1981. Thus, although there are certain small formations that may go into production in the future within the exempt area, it is not likely that any additional "newly discovered oil" in the exempt area of Alaska will go into production before the windfall profit tax is phased out pursuant to Section 4990 of the Internal Revenue Code of 1954 (26 U.S.C.).

Indeed, the very legislative materials discussed by the taxpayer appellees (Br. 18-33), in arguing that the exemption too importantly serves the congressional purpose to be severable, show that the exemption fits logically into a unified decontrol scheme designed by Congress as a careful blend of energy and revenue policies. Decontrol of domestic oil prices was intended both to alleviate market distortion caused by the disparity between the controlled domestic prices and world prices and to encourage additional oil exploration and development. As a quid pro quo for decontrol, the windfall profit that would result was to be taxed (although not entirely eliminated) in accordance with a scheme carefully tiered to serve the dual purpose of identifying the windfall with as much precision as possible and, concomitantly, not discouraging further exploration and development.[5] This herculean effort by Congress to deal as consistently as practicable, in achieving these objectives, with the myriad circumstances existing in the oil industry is fully consistent with, and indeed painstakingly serves the policies of, the Uniformity Clause.

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[5] While objecting to Congress' explicit reference to geography in defining the "fourth tier" (the exemption), taxpayer appellees nevertheless argue (Br. 13) that Congress "readily * * * could achieve such legitimate ends * * * by providing exceptions framed in terms of severe climate, high production costs, or other relevant factual variables." Nowhere do appellees show that Congress could not validly achieve precisely the same result by using draftsmanship more to appellees' liking. There was no showing here, any more than there was before Congress, that the "relevant factual variables" that led Congress to adopt the provisions at issue exist anywhere else within the United States. Thus, there has been no showing that Congress has enacted a tax prohibited by the Uniformity Clause—which is a limitation on the taxes Congress may impose, rather than a prescription of statutory draftsmanship requirements.

## II. THE WINDFALL PROFIT TAX OPERATED WITH ABSOLUTE GEOGRAPHIC UNIFORMITY AS TO ALL DOMESTIC OIL PRODUCTION DURING THE TAXABLE PERIODS IN SUIT

As we pointed out in our opening brief (at 40-43), the windfall profit tax operated with absolute geographic uniformity as to all categories of domestic oil production during the taxable periods in question in this suit. This proposition derives from the undisputed fact that there was no production of any oil that was actually exempt from tax under the "exempt Alaskan oil" provision until December 1981, almost one full year after the end of the last period covered by any of the refund claims in this case (J.A. 22, 26, 29, 31, 68, 71). Hence, even assuming arguendo that appellees are correct that the Uniformity Clause bars the exclusion for exempt Alaskan oil, they are not entitled to the refunds they seek.[6]

In response, appellees urge (Taxpayer Br. 24-26) that the absence of exempt Alaskan production during the periods in suit does not bar their recovery of refunds because the very prospect of the Alaska exemption diminished the relative value of their investment

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[6] Contrary to appellees' suggestion (Taxpayer Br. 24 n.26), we do not advance this alternative jurisdictional argument in order to postpone a decision on the merits, but because the amount of taxes at stake for this initial period is itself very substantial. The total windfall profit tax revenues collected for periods prior to January 1982 (the date when oil production commenced in the exempt area of Alaska) are more than $35 billion. See Internal Revenue Service, *Statistics of Income Bulletin* 41-42 (Fall 1982). Although the first barrel of exempt Alaskan oil was produced on December 14, 1981 (J.A. 53), the $35 billion figure includes the relatively small amount of revenues collected for the 17-day period December 14-31, 1981.

in oil fields outside the exempt area of Alaska and thereby operated to their competitive disadvantage. But apart from the fact that there is no proof that the Alaskan exemption provisions had such a negative effect upon the value of oil investments elsewhere, appellees' objections are legally insufficient. Let us suppose that Congress made the Alaska exemption effective as of January 1, 1982. In such a case appellees could make the same objection that the future operation of the exemption diminished the value of oil fields outside Alaska. Presumably, Louisiana would likewise urge that the "facial invalidity" (Br. 25) of the Alaskan exemption was a sufficient basis for adjudication of the case. Under those circumstances, however, it would be abundantly clear that appellees could not claim any injury and therefore would not be entitled to refunds because the statute would have operated with absolute geographic uniformity for the taxable periods in suit. Simply put, the potential future effectiveness of the Alaskan exemption would be irrelevant for the period in which it did not apply. Here, too, the same result should govern where, as a factual matter, the tax operated with absolute geographic uniformity. The critical consideration in this case is that the only statutory basis for the district court's jurisdiction is 28 U.S.C. 1346(a)(1)—under which it could award a refund for taxes illegally assessed and collected for the particular periods in suit. See 26 U.S.C. 7422(a). Since there was no exempt Alaskan oil production during the periods in suit, appellees are not entitled to the refunds for the taxes paid for those periods.

## III. EVEN IF THE EXEMPTION OF CERTAIN CATEGORIES OF ALASKAN OIL VIOLATES THE UNIFORMITY CLAUSE, THE REMAINING PROVISIONS OF THE WINDFALL PROFIT TAX ARE SEPARABLE AND SHOULD BE UPHELD

In our opening brief (at 43-51), we argued that assuming that the exemption provisions of Sections 4991(b)(3) and 4994(e) violate the Uniformity Clause (even for periods prior to December 1981), the district court should have applied the separability clause of Section 7852(a) of the Internal Revenue Code of 1954 and upheld the remaining provisions of the Act, or at the very least, the tax as it applies to all categories other than "newly discovered oil." Such a disposition would implement Congress' intent to preserve the revenue by including a separability clause in the Internal Revenue Code to which the windfall profit tax provisions were added.

Appellees, however, resist such an outcome to their challenge of the Alaskan exemption. Starting from the undisputed premise that "[c]ongressional intent controls" (Taxpayer Br. 27), they argue that the Alaskan exemption provisions were such a critical portion of the Act, that Congress would not have imposed the windfall profit tax without the Alaskan provisions. Hence, they argue that the alleged defects of the Alaskan exemption requires the invalidation of the entire statute as it applies to all taxable categories.

But the intent of Congress was precisely to the contrary. As we pointed out in our opening brief (at 45-46), Congress understood that in the event the Alaskan exemption provisions were declared invalid,

the separability provision of Section 7852(a) would apply to save the remaining provisions of the Act.[7] Indeed, during the debate on the tax, Senator Long, the Chairman of the Finance Committee and the floor manager of the bill in the Senate, expressly reassured the Senate on this point, in terms that bear repetition here (126 Cong. Rec. S3056 (daily ed. Mar. 26, 1980))—

> It is our thought that there is a separability clause in the Internal Revenue Code which applies to everything in the code and to all amendments to it, and we would expect and we would intend, if the courts should find a constitutional objection valid with respect to the Alaskan oil exemption, that the Alaskan oil exemption should not stand and that Alaskans or those producing oil in Alaska would have to pay the same 30 percent tax on new oil that everybody else would have to pay.

As Senator Long pointed out to the Senate, his reassurance as to severability was supported by an opinion of the Office of Legislative Counsel, which was printed in the Congressional Record by unanimous consent. *Id.* at S3056-S3057. In these circumstances, it is clear that Congress intended the separability clause of Section 7852(a) to apply in the event it was necessary to save the remaining provisions of the

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[7] Hence, *Zobel* v. *Williams*, No. 80-1146 (June 14, 1982), upon which the taxpayer appellees rely (Br. 8, 27), is distinguishable. There, the statute in question contained a specific proviso that the entire Act should fall, if any of its provisions were held invalid. Nor is *Davis* v. *Wallace*, 257 U.S. 478 (1922), cited by Texas (Br. 27) and Louisiana (Br. 40), pertinent. Unlike the instant case, there was no indication whether the legislature there intended that a class given preferential treatment should be taxed on the same basis as other taxpayers if the preference were held invalid.

windfall profit tax. See Brief Amicus Curiae, Rep. Silvio O. Conte 10-12.

Appellees concede that no contrary views were expressed as to the applicability or operation of Section 7852(a) by any proponent or opponent of this legislation in either the House or the Senate. They nevertheless suggest that Senator Long's statement should be disregarded because it is entitled to less weight than views set forth in committee reports (Taxpayer Br. 33-34), that the "exempt Alaskan oil" provisions were of such overriding importance to Congress that the tax would not have been enacted without the exemption (*id.* at 28-31) and that, at all events, Congress would have been unable to enact any tax at all had Senator Stevens' opposition to the bill not been overcome by offering the compromise amendment providing for the Alaskan exemption in the Senate bill (*id.* at 31-32).

But the authoritative force of Senator Long's statement as to separability was in no way contradicted by the various committee reports. The sequence of events shows that the questions regarding the possibility that the Alaskan exemption would violate the Uniformity Clause were not raised until after those reports were issued. Thus, the floor debate offers the only direct evidence of Congress' intent on this question. While there was no "debate" as such on this point, the undisputed fact is that no member of Congress rose to challenge, or even question, Senator Long's conclusion that the tax would be applied to all Alaskan production in the event the exemption would be held invalid. His statement simply put to rest the questions that had been raised on this subject. The plain inference is that Senator Long satisfied Congress that the separability clause would apply.[8] It is

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[8] Given the reservations expressed by several Senators as to the validity of the Alaskan exemption and Senator Long's

that evidence that constitutes the congressional intent that appellees acknowledge to be the "controlling principle" governing separability.[9]

Moreover, we do not quarrel with the fact that the Alaskan exemption provisions were of considerable importance to Congress. There is no doubt that Congress was concerned that the general imposition of a windfall profit tax with respect to newly discovered oil could have a deterrent effect on future discovery and development, particularly in the case of new Alaskan oil. But the main purpose of the tax was to raise revenue from the windfall profits that Congress determined would accrue from the decontrol of domestic oil prices. There is no evidence in the legislative history that Congress would have foregone the entire tax and the $227.3 billion in revenue it was estimated to produce over a 12-16 year period, if it could not have provided an exemption for North Slope Alaskan oil—a matter of far less magnitude in the context of the overall revenue package.

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reassurance, there is no basis for the taxpayer appellees' claim (Br. 41-42) that taxpayers presently benefitting from the Alaskan exemption would be "unfair[ly] surprise[d]" by a decision subjecting them to the tax and that such a disposition would pose "serious Constitutional problems." See *United States* v. *Darusmont*, 449 U.S. 292 (1981).

[9] Appellees also argue (Taxpayer Br. 5, 34 n.48) that Senator Long's statement during the legislative debate is not authoritative because he has subsequently altered his views as to the wisdom of the windfall profit tax. But such subsequent statements have no bearing whatsoever upon the intent of Congress in enacting these provisions. *Toner* v. *Commissioner*, 629 F.2d 899, 902 (3d Cir. 1980), cert. denied, 450 U.S. 916 (1981); *Patzkowski* v. *United States*, 576 F.2d 134, 136 n.2 (8th Cir. 1978); *Aparacor, Inc.* v. *United States*, 571 F.2d 552, 556 (Ct. Cl. 1978).

Finally, there is no basis for the taxpayer appellees' contention that the exemption was the price for Senator Stevens' support for the tax because he was in a position to thwart, single-handedly, the substantial majority that favored the adoption of the measure from even bringing the bill to a vote. Indeed, such arguments would be equally applicable to severability questions regarding virtually any statute that was at all controversial at the time of its enactment. The question is not what might have happened if the bill's opponents had resorted to parliamentary delaying tactics, but what was the intent of the majority approving the bill.[10] That intent, we submit, was premised on the assumption that the Alaskan exemption was subject to the separability clause of Section

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[10] The taxpayer appellees repeatedly assert (Br. 8, 31-33) that the exemption was, in some fashion, the price exacted by opponents of the tax for permitting the Act to come to a vote. But if the political bargains underlying the Act are at all germane, the legislative record makes clear that the primary bargain was the enactment of the windfall profit tax in exchange for decontrol of oil prices. See H.R. Rep. No. 96-304, 96th Cong., 1st Sess. 4, 7 (1979); S. Rep. No. 96-394, 96th Cong., 1st Sess. 6-7 (1979). Indeed, the *quid pro quo* between price decontrol and the tax is supported by explicit statements by members of Congress. See remarks of Rep. Jones (Oklahoma) ("I recognize fully that in order to get decontrol of oil some kind of tax will have to be imposed. That is the political price of decontrol."); Rep. Michel (Illinois) ("practical politics dictates the tax in order to get decontrol"); Rep. Brown (Ohio) ("if this bill does not pass, this conference effort, we will have the possibility of the President * * * re-regulating oil in this country"), 126 Cong. Rec. H1844-H1846 (daily ed. Mar. 13, 1980). Ironically, appellees' solution to strike down the windfall profit tax in its entirety would leave oil producers with all of the benefits of decontrol without the burdens of the tax on the ensuing windfall profits that Congress clearly intended to impose.

7852(a) of the 1954 Code. Hence, Congress intended that the tax would remain fully applicable to the appellees regardless of the merits of their Uniformity Clause contention.[11]

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[11] *Marchetti* v. *United States,* 390 U.S. 39 (1968), upon which the taxpayer appellees rely (Br. 42-43), does not support their contention that this Court has no alternative but to strike down the tax in its entirety if it agrees with their contention that Alaskan exemption provisions violate the Uniformity Clause. There, the Court held that federal wagering taxes could not be criminally enforced on the ground that to do so would violate the Fifth Amendment privilege against self-incrimination of those subject to the tax. While it declined to prescribe additional rules that would preclude the government from using information provided by taxpayers subject to those taxes for criminal prosecution purposes or from sharing such information with the states, the Court noted that it was not holding the taxes themselves invalid. 390 U.S. at 61; see also *United States* v. *United States Coin & Currency,* 401 U.S. 715, 717 (1971). Thus, *Marchetti* in fact supports our position that if a statute is constitutionally defective, the courts need not invalidate the enactment as a whole. To the contrary, the remedy need go no further than necessary to remove the defect.

While taxpayer appellees suggest at one point that the prospect of merely eliminating the Alaskan exemption would have chilled their incentive to sue (Br. 36), that is flatly inconsistent with their argument (Br. 24-26) that the mere existence of the as-yet-unused exemption during the taxable years in issue operated to their competitive disadvantage. Hence, no danger to the preservation of incentive to sue is posed in this case by our contention that the exemption is severable—even if that would be a pertinent consideration in some other context. Cf. *Valley Forge Christian College* v. *Americans United,* 454 U.S. 464, 489 (1982).

## CONCLUSION

For the reasons stated above and in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted.

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APRIL 1983

* The Solicitor General is disqualified in this case.

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No. 82-1066



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

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UNITED STATES OF AMERICA, *Appellant*,

v.

HARRY PTASYNSKI, *et al.*, *Appellees*.

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## BRIEF *AMICUS CURIAE* OF THE STATE OF ALASKA

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---

## BRIEF *AMICUS CURIAE* OF THE STATE OF ALASKA

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This brief is in support of the United States. Under Supreme Court Rule 36.4, written consent of the parties is not required.

### INTEREST OF THE STATE OF ALASKA

This suit concerns the constitutionality of the "Alaskan exemption" to the Windfall Profit Tax (WPT)[1] under the Uniformity Clause of the United States Constitution.[2] The areas exempted by the challenged provision include portions of the State of Alaska and offshore properties adjacent to the State which are under the jurisdiction of the United States.

Alaska's interest is threefold. First, the state has a strong interest in assuring that development in the ex-

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[1] Crude Oil Windfall Profit Tax Act of 1980, Article I, 26 U.S.C. (Supp. V) § 4986-4998.

[2] Art. I, § 8, cl. 1.

empt areas is not discouraged. In view of falling oil prices, oil properties in Alaska which were promising a few months ago are becoming marginal. If these areas are subjected to the WPT, even at a low rate, development of new reserves may not be economically feasible. The state thus stands to lose potentially substantial severance tax and royalty revenues if these areas are not developed; the nation as a whole is harmed by a disincentive to develop significant domestic reserves.

Second, to the extent that oil is produced within exempt areas in the state, that production will be more profitable without the tax. Since the WPT is a deduction against state corporate income tax, state revenues under that tax could be diminished if the areas were not exempt.[3]

Finally, the state, as a sovereign member of the United States, has an interest in the proper interpretation of the Uniformity Clause. The clause presents a tension between the wide latitude afforded Congress in picking and choosing appropriate subjects of taxation and a protection to the states against discrimination or favoritism. The construction given the clause by this court may have long term ramifications in resolving that tension.

## SUMMARY OF ARGUMENT

The Uniformity Clause does not present an absolute bar against legislation based on geographical features. Uniformity is met if a tax "operates with the same force and effect in every place where the subject of it is found." The *Head Money Cases*, 112 U.S. 580, 594 (1884). If

[3] Imposition of the tax has no effect on state severance tax or royalties from state leases.

geographical features serve to distinguish one subject from another, then Congress may describe the operation of a tax along geographical lines. The tax at issue in the *Head Money Cases* operated only in ports, and not in interior locations. But ports are necessarily located exclusively on the seacoast, which is as much a geographical feature as the geographical boundaries of the Alaskan exemption.

If a separate subject occurs only in one geographical area, then Congress, by taxing or exempting that subject, is doing so "in every place in which the subject . . is found." Id. Congress is not constrained by the Clause from using geographic terms to define that subject. It would be elevating form over substance to require Congress to refrain from using geographic terms if those terms are the simplest way to describe the subject.

The question presented is whether Congress, in adopting the exemption, was defining a separate category of oil production which it chose to exempt, or whether production within the exemption is the same "subject" as other oil production and therefore, since it occurs in other locations, must be taxed with the other production. If it is a separate subject, then the exemption is valid even though it uses geographic terms in its description.

The Uniformity Clause, like the Port Preference Clause, prohibits discrimination or favoritism between the states. The Uniformity Clause speaks to political, not physical, geography. While Congress has broad leeway in picking the subjects of taxation, the Uniformity Clause limits that power by prohibiting Congress from taking the political boundaries of the states into consideration when it defines a subject of taxation. Under the Uniformity Clause, the borders of the states must be irrelevant. The Windfall Profit Tax is blind to state borders. It does

not operate, as the District Court apparently thought that it did, to relieve "one state, Alaska" from the imposition of the tax. J.S. App. A, 7a. A producer is not exempt because he produces within Alaska; tier 1 oil is taxed identically in Alaska and California. A producer is exempt if he operates in areas where there is harsh climate, lack of transportation, and high costs — considerations which have nothing to do with the political boundaries of the state.

The factors which led to the Alaskan exemption are unique to the areas defined in that exemption. For example, permafrost exists in almost the entire exempt area, and is found in no other state in the nation. The existence of permafrost has a profound affect on oil development activities. It makes the terrain extremely fragile, so that activities must be limited to the winter months to prevent damage to the ground cover. Extraordinary steps must be taken, both to protect the environment and to prevent failure of facilities.

These facilities must be built in areas that are sometimes hundreds of miles from the nearest existing ground transportation. Roadless areas of the magnitude of those found in the Alaskan exemption do not occur anywhere else in the nation.

Activities are limited, by permafrost, to the winter months when cold temperatures prevail. These are also the months of darkness. At Point Barrow in the winter, the sun does not come up for nine weeks. There is no day, anywhere else in the United States, when the sun does not breach the horizon.

Congress gave preferred or exempt treatment to many categories of oil under the WPT in recognition of the fact that some oil is relatively more expensive to develop and

produce than other oil. The Alaskan exemption is a legitimate exercise of Congressional power to recognize that these conditions of harsh climate, lack of transportation and high costs, would, if combined with the WPT, "discourage exploration and development of reservoirs . . ." in the areas within the exemption. H.R. Conf. Rep. No. 96-817, 96th Cong., 2d Sess. 103 (1980).

## ARGUMENT

### I The Windfall Profit Tax As It Applies In The State

Significant oil development and production in Alaska began with discovery in the Swanson River field in 1957. Production in this area, on federal leases on the Kenai Peninsula, began in the early 1960s. Offshore production in state waters in Cook Inlet followed in the late 1960s. North Slope discoveries came in the late 1960s with the Kuparuk River field in 1967 and the Sadlerochit Reservoir at Prudhoe Bay in 1968. Production from the Sadlerochit Reservior began with the completion of the Trans-Alaska Pipeline System (TAPS) in 1978. Production from the Kuparuk field began in 1981. To date, there is no production in offshore areas adjacent to the state which are under federal jurisdiction.

Alaska presently produces approximately 1,703,000 barrels of oil per day, or about one-fifth of the total national domestic production of 8,450,000 barrels per day. Of these Alaskan barrels, approximately 1,530,000 are from the Sadlerochit Reservoir, 100,000 from Kuparuk, 65,000 from Cook Inlet and 8,000 from the Swanson River field.

Two of the many exemptions in the WPT currently apply in Alaska. First, like all state royalty interests, the state's 12.5 percent royalty from state leases is exempt as

oil from a "qualified governmental interest."[4] Second, and the subject of this appeal, oil from the goegraphic area described in Section 4994(e) is "exempt Alaskan oil."[5] That section provides:

> For purposes of this chapter, the term 'exempt Alaskan oil' means any crude oil (other than Sadlerochit oil) which is produced—
>
> (1) from a reservoir from which oil has been produced in commercial quantities through a well located north of the Arctic Circle, or
>
> (2) from a well located on the northerly side of the divide of the Alaska-Aleutian Range and at least 75 miles from the nearest point on the Trans-Alaska Pipeline System.

Production in Prudhoe Bay (Sadlerochit), Cook Inlet and Kuparuk is all on state leases under a royalty of 12.5 percent. The "Alaskan exemption" includes oil produced north of the Arctic Circle (except Sadlerochit) or north of the Alaska-Aleutian Range divide and more than 75 miles from TAPS. Cook Inlet is south of that divide, and therefore not exempt. Swanson River is similarly south of the divide and not exempt. Prudhoe Bay production from the Sadlerochit reservoir (all North Slope production except Kuparuk) is specifically not exempt. Thus, the only oil exempt from the WPT under the "Alaskan exemption" is the non-royalty portion of Kuparuk production:

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[4] Section 4991(b)(1).

[5] Section 4991(b)(3).

## Alaskan Oil Production Under the WPT

### Barrels Per Day

| Field: | Sadlerochit | Kuparuk | Cook Inlet | Swanson | Total | % of Total |
|---|---|---|---|---|---|---|
| Production | 1,530,000 | 100,000 | 65,000 | 8,000 | 1,703,000 | 100% |
| State Royalty (exempt) | 191,250 | 12,500 | 8,125 | 0 | (211,875) | 12.4% |
| Alaska Exemption | 0 | 87,500 | 0 | 0 | (87,500) | 5.1% |
| Total Barrels Per Day Subject to Tax: | | | | | 1,403,625 | 82.6% |

Thus, 5 percent of Alaska production is exempt under the Alaskan exemption. More than 82 percent of Alaskan production is taxed.

The WPT sets varying rates of taxation for various categories of oil. Thus, independent producer oil, stripper oil, front-end and incremental tertiary oil, and heavy oil are all treated with some favor or exempt altogether. None of these provisions applies to Alaskan oil to any significant degree; Alaska has no stripper wells, no tertiary recovery projects, no heavy oil and very little oil produced by independent producers. Thus, Alaskan oil which is taxed is taxed at the highest rate.

### II The Uniformity Clause Does Not Prohibit Congress From Describing An Appropriate Subject For Taxation Or Exemption In Geographic Terms

Congress has wide latitude in picking and choosing among appropriate subjects of taxation.[6] This power extends to making distinctions among similar subjects. In interpreting the Uniformity Clause,[7] this Court noted that tariff acts "frequently contained an elaborate system of minimum classifications and compound duties as well as exemptions for importations below a certain level." *Knowlton* v. *Moore*, 178 U.S. 41, 93 (1900). This broad power is limited by the requirement imposed by the Uniformity Clause. That requirement is met when a tax "operates with the same force and effect in every place

[6] Fernandez v. Wiener, 326 U.S. 340, 352 (1945) ("Congress has a wide latitude in selection of objects of taxation."); Sonzinsky v. United States, 300 U.S. 506, 512 (1937) ("Congress may select the subjects of taxation, choosing some and omitting others.").

[7] "The Congress shall have the power to lay and collect taxes, duties, imposts and excises, . . .; but all duties, imposts, and excises shall be uniform throughout the United States."

where the subject of it is found." The *Head Money Cases*, 112 U.S. 580, 594 (1884).

The District Court held flatly that "[d]istinctions based on geography are simply not allowed." J.S. App. A, 7a. But this Court's prior cases indicate that this per se rule is untenable. In the *Head Money Cases*, the tax at issue was levied on passengers from foreign ports arriving by steam or sail, but not on passengers arriving from foreign countries by inland transportation. The Court found that the tax applied uniformly in all ports and declined to invalidate it because it did not apply in the interior. 112 U.S. at 594. But ports necessarily are found only on the seacoast, which is as much a geographical feature as the Alaska-Aleutian Range or the Arctic Circle. It would be elevating form over substance to conclude that the valid tax at issue in the *Head Money Cases* would become unconstitutional if the tax were written to apply only within a certain number of miles of the sea. This is precisely what this court has said in ruling on related constitutional provisions.

In interpreting the uniformity provision of the Bankruptcy Clause,[8] this Court stated that the provision "does not deny Congress power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 159 (1974). The Rail Act was written to apply only in a limited geographical region. In concluding that the regional act did not violate the Bankruptcy Clause uniformity provision, the Court relied on the analysis of the *Head Money Cases* and stated that its "construction

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[8] Art. I, § 8, cl. 4.

of the Bankruptcy Clause's uniformity provision comports with this Court's construction of other 'uniform' provisions of the Constitution." Id. at 160.

The Court quoted the holding of the *Head Money Cases* that "the evil to be remedied by this legislation has no existence on our inland borders, and immigration in that quarter needed no such regulation" and held that "[s]imilarly, the Rail Act is designed to solve the evil to be remedied, and thus satisfies the uniformity requirement of the Bankruptcy Clause." Id. at 161. The Court refused to distinguish the Rail Act from the head tax statute on the grounds that the former "by its own terms . . . applies only to one designated region," and stated that the argument was "without merit." Id. Consequently, the conclusion can be drawn that it is legitimate for Congress to take geographic differences into account without running counter to the Uniformity Clause so long as the evil to be remedied differs along geographic lines. The Congressional debates and reports show that Congress was intent upon remedying the peculiar evil presented by harsh climate, lack of transportation facilities, and high costs associated with production when it adopted the Alaskan exemption. These considerations are addressed at Section IV of this brief.

A second line of analysis leads to the same conclusion. In the *Head Money Cases*, the Court could have viewed the statute as taxing the "subject" of the importation of passengers from foreign countries. As such, the tax might not have been uniform if it did not apply in the interior. Instead, it noted that the tax was "an excise duty on the business of bringing passengers from foreign countries into this *by ocean navigation*" and easily found that the subject of taxation was taxed uniformly wherever it was found. 112 U.S. at 594, emphasis added.

It is clear from the face of the WPT that the Act does not simply tax the single subject of oil production, or even the single subject of a windfall profit (defined as removal price less adjusted base price). The Act taxes a wide variety of related subjects, including what Congress perceived as the windfall attributable to independent producer oil, stripper oil, tertiary oil, heavy oil, and Indian oil. Congress has the power to make such distinctions among related subjects, tax some at a heavy rate, some at a lower rate, and exempt others altogether.

Thus, the question becomes whether Congress, in adopting the Alaskan exemption, was defining a separate and distinct category of oil production which it chose to exempt, or whether production within the Alaskan exemption is the same "subject" as some other oil production which since it occurs in other locations, must be taxed at the same rate.[9] Clearly, if it is a separate "subject," the exemption does not offend uniformity; as the Court in the *Head Money Cases* pointed out, "[i]s the tax on tobacco void, because in many States no tobacco is raised or manufactured?" 112 U.S. at 594. As will be discussed more thoroughly later, there is ample evidence that oil produced within the geographic limits of the Alaskan exemption is properly treated as a separate subject from other new oil, just as oil of an independent producer is treated separately from oil of an integrated producer, or stripper oil from tertiary oil.

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[9] "[W]hatever plan or method Congress adopts for laying the tax in question, the same plan and the same method must be made operative throughout the United States; that is to say, that wherever a subject is taxed anywhere, the same must be taxed everywhere throughout the United States, and at the same rate." Knowlton v. Moore, supra, 178 U.S. at 84.

The Uniformity Clause speaks to political, not physical geography; that is, the borders between the states. So long as Congress is exercising its nearly unlimited power to pick and choose among subjects of taxation, an act should not fail for want of uniformity even though a subject is defined in geographic terms. If, however, Congress discriminates among the states by exposing some to a higher rate of taxation or exempting others, and that discrimination is based on the political boundaries of the states, then the Uniformity Clause is violated.[10]

### III The Alaskan Exemption Does Not Violate The Uniformity Clause Because It Does Not Prefer Or Discriminate Among The States

The uniformity required by the Uniformity Clause is geographical rather than intrinsic. *Knowlton* v. *Moore*, *supra*, 178 U.S. at 106. However, this Court has never been asked to decide precisely what is meant by that geographical uniformity. The language of prior decisions, including those on related constitutional provisions, indicates that the geography referred to is political geography rather than geography based on physical features. That is, the Uniformity Clause prohibits discrimination or favoritism between states, made for or against the states on the basis of the political boundaries of those states.

Congress has unfettered discretion in choosing among the subjects of taxation and has the power to make distinctions based on whatever differences between related

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[10] Taxpayer and association appellees have argued that if the Alaskan exemption is upheld because it is supported by a rational basis, then the Uniformity Clause becomes "merely" an Equal Protection Clause. Appellees' Motion to Affirm at 9. But it is the added protection of freedom from political favoritism or discrimination among the states that gives the Uniformity Clause its separate validity.

subjects it perceives as important. The Uniformity Clause makes one limitation on that power. Under the Clause, Congress may not use distinctions among or between the states, as political entities, as a basis for distinguishing among subjects of taxation. For example, if alcohol is taxed at ten cents on the gallon in Illinois, it may not be taxed at a nickel in Wisconsin solely because it is found within the borders of Wisconsin.[11]

The Uniformity Clause "look[s] to the forbidding of discrimination as between the states." *Knowlton* v. *Moore*, 178 U.S. at 89. The Court in that case concluded that "the possible discrimination against one or more states was the only thing intended to be provided for by the rule which uniformity imposed upon the power to levy duties, imposts and excises . . ." Id. The political boundaries of the states must be irrelevant when Congress levies the listed taxes so that, for federal purposes, it does not matter on which side of a state's border an activity or subject of taxation occurs. Thus, a tax which is blind to state political borders should be valid notwithstanding that a portion of its operation speaks to unique regional circumstances.

This construction is supported by this Court's explanation of the related Port Preference Clause.[12] This Court has held that the Uniformity Clause and the Port Preference Clause were "one in purpose, one in their adoption."

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[11] Oil production is peculiarly amenable to a distinction based on physical geography, since the occurrence of oil and, therefore, the conditions under which it is produced, is entirely a function of physical geography. Thus, it would be difficult to imagine a justification for, for example, a tax distinction between alcohol on one side or the other of the Mississippi; oil, however, must be produced where it is found.

[12] Art. I, § 9, cl. 6.

*Knowlton* v. *Moore*, 178 U.S. at 105.[13] In *Pennsylvania* v. *The Wheeling and Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855), it is argued that Congressional legislation authorizing a bridge across the Ohio River at Wheeling, Virginia was void since the bridge obstructed navigation to Pittsburgh, and thus preferred the port of Wheeling over Pittsburgh. The Court held that the Clause "looks to a prohibition against granting privileges or immunities to vessels entering or clearing from the ports of [one] state over those of another," and that "it is a mistake to assume that Congress is forbidden to give a preference to a port in one state over a port in another." This Court explained:

> The truth seems to be, that what is forbidden is, not discrimination between individual ports within the same or different states, but discrimination between states; and if so, in order to bring this case within the prohibition, it is necessary to show, not merely discrimination between Pittsburgh and Wheeling, but discrimination between the ports of Virginia and those of Pennsylvania.

*Id.* at 435.

Under this analysis, it would be necessary to show that the WPT discriminates between states; that is, that Alaska, as a political entity, is preferred. The Wyoming District Court apparently concluded that such a preference was written into the Act. "The Act, on its face, says that one state, Alaska, is not subject to the same tax, at the same rate as all other states." J.S. App. A, 7a. An Act which exempted Alaska *qua* Alaska would indeed give rise to scrutiny under the Uniformity Clause. But the WPT does not work that way.

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[13] A comprehensive discussion of the relationship between the Uniformity Clause and the Port Preference clause appears at pp. 23-27 of appellant's brief.

An oil producer is not relieved of obligations under the WPT because he enters the state of Alaska. New oil in Cook Inlet is taxed at the same rate as new oil in Long Beach. Tier 1 oil at Prudhoe Bay is subject to the same tax, and at the same rate, as tier 1 oil elsewhere. Certain producers are exempt on certain properties where conditions of harsh climate, lack of transportation and high costs prevail. But offshore production north of Prudhoe Bay will be exempt if it is within the political borders of Alaska, and it will be exempt if it is outside the borders of the state, in federal waters more than three miles from land. The exemption is blind to political borders.[14]

Thus, oil production is exempted not because it is Alaskan, but rather because it takes place under unique circumstances which are a function of physical geography. The exemption is based on the physical geography of the mountain range, the Arctic Circle, and the pipeline corridor, and extends "throughout the United States" to the limit of the nation's taxing jurisdiction.[15] The exemption is not the sort of distinction that the Uniformity Clause prohibits.

### IV The Alaskan Exemption Describes A Separate Category Of Oil Production Which Is Legitimately Exempt From The Windfall Profit Tax

The Congressional debates and reports amply indicate that several concerns led to the Alaskan exemption: harsh

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[14] The fact that only 5 percent of present Alaskan production is exempt from the WPT (Section I, supra) is evidence that the exemption does not prefer Alaska over other states.

[15] It is an accident of political history that the United States has but one state in the arctic-subarctic regions. If Alaska were split into several states, or if by treaty with Canada the Yukon became a state, the exemption would operate throughout parts of those states without reference to the borders between them.

climate, fragile environment, the transportation implications of remote location, and high costs. As Senator Stevens stated:

> Development and production of [Alaskan] reserves . . . is by all accounts expensive and difficult. Short construction seasons and the effects of severe arctic winters take their toll on men and equipment. Special steps must be taken to preserve a fragile arctic environment. The costs of transportation and labor are high.

125 Cong. Rec. S17422 (daily ed. Nov. 28, 1979). Senator Gravel noted that exploration and development in frontier areas were subject to a greater degree of risk:

> Major factors contributing to these increased risks are severe weather conditions, remoteness, sensitive environmental and geological charateristics, and a lack of normal social and industrial infrastructure.

125 Cong. Rec. S16327 (daily ed. Nov. 8, 1979).

As a result of these factors, the conference report indicated that the exemption "reflects the concern of the conferees that taxation of this production would discourage exploration and development of reserves in areas of extreme climatic conditions," H.R. Conf. Rep. No. 96-817, 96th Cong., 2d Sess. 103 (1980). The many and various references to these concerns have been set out by appellant and other amici, and will not be repeated here. Each deals with the concerns expressed by Alaska's Senators, and the conclusion that if oil in the exempt area were taxed, the development of significant national reserves might be discouraged.

Congress recognized that these factors could be anticipated to have an effect on the feasibility of future production in Alaska. The question is whether Congress could have concluded that oil production in the exempt area was

a separate subject from oil production anywhere else in the United States so that it could be given different tax treatment; whether harsh climate, lack of transportation and high costs presented a peculiar evil which Congress was addressing by the exemption.

### THE AREA

The area described by the Alaskan exemption includes most of the state in terms of acreage. The Alaska-Aleutian Range sweeps up from the Aleutians in the southwest, and describes an arc which reaches its northermost extension at Denali (Mt. McKinley) and the three peaks of Deborah, Hess and Hayes, approximately 75 miles south of Fairbanks. See map, Appendix A. It then turns toward the southeast again as it crosses the Canadian border. The pipeline corridor described in the exemption reduces the exempt area by a 150 mile wide swath going north from the range across Fairbanks, past the Yukon River to the Arctic Circle, about 100 miles north of Fairbanks.

But acreage is probably the only measurable indicator of size that puts the majority of the state in the exempt area. Substantially all of the state that is developed is outside the exemption. Many a visitor to Alaska is likely to return home satisfied that he or she has seen most of the state having never set foot in the exempt area. Many Alaskans have never been there. Anchorage, Fairbanks and Juneau are not exempt. Kodiak Island, the Kenai Moose Range, the Inland Passage, Glacier Bay, Seward, Cordova, Homer, Yakutat, Wrangell and Ketchikan are all south of the line drawn by the exemption. McKinley Park, which straddles the divide, is partially within the exemption. Nome, Kotzebue, Barrow and Bethel are the only "major" settlements in the exempt area; Bethel, the largest, has a population of approximately 3550. More

than 85 percent of Alaska's population resides south of the exemption.[16] None of Alaska's farmland, either in the Matanuska-Susitna valley or the Delta area, is in the exempt area. Chances are quite good that if one landed at an airport with a control tower, that airport was south of the exemption. Of the three major highways—the Richardson, Glenn and Parks, the first two are entirely outside the exemption; the Parks, which connects Anchorage and Fairbanks, is more than 75 miles from TAPS for a short stretch from the divide north to about the northern border of McKinley Park. Most of the economic activity in the state is outside the exemption, with the major exception being the Bristol Bay fishery. And, as was explained at Section I supra, almost all Alaska's oil is produced outside the exemption.

It cannot be questioned that Alaska has a harsh climate, a fragile environment, a general lack of transportation facilities and resultant high costs. But in order to understand the effect that Congress perceived the combination of these factors might have been on future oil production, a little more is necessary than the bare assertion that these conditions exist.

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[16] Alaska Planning Information, Alaska Department of Labor, January, 1983, Table II-3, Population by 1980 Census Areas. This figure is approximate since census areas do not follow the line of the Alaskan exemption. Thus, Bristol Bay was treated as exempt even though a small portion of its population would be outside the exemption, and Fairbanks-North Star Borough was treated as non-exempt although a few residents would be more than 75 miles from TAPS. If the North Slope Borough, which includes many Prudhoe Bay workers, and the Aleutians are considered entirely exempt, 86.4 percent of Alaskans live outside the exempt area. If those two census areas are ignored, then 89.8 percent are outside the exemption.

## COSTS

Climatic, environmental and transportation difficulties do not, in any intrinsic sense, justify an exemption from a tax on profit; if a profit is made under those conditions, and profits are taxed, then production from these areas should arguably be taxed. But the word "profit" in the "Windfall Profit Tax" makes the title of the Act a misnomer. The Act does not tax "profit," that is, gross income less expenses. It is an excise tax on certain statutorily identified income, a tax that is levied without regard to the costs associated with earning that income.[17] If two barrels of oil fall within the same category of the WPT, they are taxed at the same rate regardless of relative profitability.[18] Within each taxing category, the WPT is blind to profits.

But the WPT does not tax all windfall profits at the same rate. The Act sets up an intricate scheme whereby oil is taxed differently on the basis of a wide variety of differences: independent producer or integrated producer; stripper oil; front end or incremental oil from a tertiary recovery project; heavy oil; or new oil. Many of these differences reflect a Congressional recognition that costs are not identical in every type of production. Since an overriding purpose of the WPT was to insure that production was not discouraged, Congress concluded that

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[17] Senator Stevens stated: "This is an excise tax. It has nothing to do with costs." 125 Cong. Rec. S17478 (daily ed. Nov. 29, 1979).

[18] Two barrels produced by integrated producers in Tier 1 might have an identical windfall profit of, for example, $3.00. But the first might have a profit below the base price of $5.00 while the second, due to higher costs, might have a profit below the base price of only $1.00. Thus, both would pay the same tax of 70 percent on the three dollars, or $2.10, but that amount would be 52.5 percent of total profit for the first producer and only 26.25 percent of profit for the second.

recognition of the varying costs related to development and production of oil was necessary to accomplish the purposes of the Act.

Transportation and climatic conditions add substantially to the cost of developing and producing oil in Arctic and sub-Arctic Alaska. It is not possible for the state to present a cumulative, quantitative estimate of comparative costs here and elsewhere, since oil producers consider the information proprietary. But some costs can be estimated, and at least a part of the overall picture can be seen.

The American Petroleum Institute reported comparative costs for drilling wells in Alaska, California, Louisiana and Texas in 1976. For onshore wells, the average cost in Alaska was $3,181,000 compared to the next highest cost in Louisiana of $292,000. The cost per foot was higher, and the average depth was higher. For offshore wells (primarily Cook Inlet at that time) the cost per foot was close to other parts of the nation, but the average depth was much greater. Average cost in Alaska was $2,046,000 compared with the next highest cost of $1,617,000 in Texas.[19]

Standard & Poor's Industry Surveys reported the cost per foot to drill and equip wells in 1980 in various regions by depth intervals. Looking at a sampling of depth intervals in the four states in the previous report, from 2,500 feet to 3,749 feet, Alaskan cost per foot was $898 compared with $93 in California, $36 in Louisiana, and $40 in Texas. In the 7,500 to 9,999 interval, Alaska was $305, California $91, Louisiana $135 and Texas $70. At 15,000

[19] 1976 Joint Association Survey on Drilling Costs, API, December 1977.

to 17,499 feet, Alaska was $1,058 with the next runner up, Louisiana, at $293.[20]

Senator Gravel presented figures showing that "[t]he cost of drilling a well in Alaska is 15 times greater than the cost of drilling a well in the rest of the United States." 126 Cong. Rec. S2630 (daily ed. Mar. 19, 1980).

The cost of wells is only a fraction of total development costs. The climatic and transportation factors discussed below affect every phase of activity. Workers and equipment must be transported great distances. Workers are paid extremely high wages,[21] and must be fed and housed on site. If, for example, operations are suspended at a drilling site due to spring thaw, an experienced crew might be kept standing by for as long as two weeks. But it can cost $50,000 to $60,000 per day to keep a crew on stand-by. The factors influencing these costs are unique to a portion of Alaska.

## CLIMATE

Visitors to Alaska are often surprised to discover that it can be quite hot in Fairbanks on a July afternoon. The long summer days, with the sun scarcely dipping below the horizon and twilight merging into dawn, belie the effect that winter has on the environment. But in the interior and in the north, summer is a brief notorious period of teeming life and growth, preceded by a few days of spring and followed by a few days of fall. Winter takes the rest.

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[20] Standard & Poor's Industry Surveys, Oil-Gas Drilling and Services, Vol. 150, No. 40, Sec. 1 (Oct. 7, 1982) 0118.

[21] Senator Gravel stated that a "lower 48 worker costs approximately $9 per hour while the same worker on the North Slope costs approximately $41 per hour." Id.

That the winters are cold cannot be contested. But it is also cold in Minnesota, in North Dakota and in Idaho. Once in a while, it is even unexpectedly warm in Alaska; every year or so the national media delights in reporting that it is colder in Miami on a December day than in some Alaskan city. But the overall, long term, average temperature is colder in Alaska than in any other part of the nation. The obvious physical manifestation of this cold is the existence of permafrost, a common occurrence in Alaska which simply does not exist in other states (except perhaps at extreme altitudes).

Permafrost is generally defined as ground which has remained frozen from one winter through the next,[22] although some authors use two years.[23] Of all the environmental and climatic conditions which make development more difficult in the north than in other parts of the nation, permafrost is probably the most critical. Permafrost makes engineering difficult, and makes the terrain fragile.

The line of discontinuous permafrost in Alaska is remarkably close to the line drawn by the Alaskan exemption. See Appendix A. This line continues through the Yukon Territory, along the northern portion of the Canadian Provinces, and meets the Atlantic Ocean in Newfoundland. It does not enter the contiguous United States.[24] Permafrost varies from a few inches thick in the

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[22] Alaska Regional Profiles, Yukon Region, University of Alaska (prepared for the State of Alaska and The Joint Federal-State Land Use Planning Commission for Alaska) 98.

[23] Environmental Atlas of Alaska, University of Alaska (1969).

[24] Permafrost, North American Contribution, Second International Conference, National Academy of Sciences (1973) 73 (Brown and Pewe, Distribution of Permafrost in North America).

southern areas of its occurrence to 2,000 feet thick at Prudhoe Bay. It also varies in its composition, from bedrock to fine, silty soil. But the general rule is that permafrost of whatever description must be left undisturbed.

Most of the permafrost area in the state supports some surface vegetation, whether forest or tundra or the mosses and sedges of the North Slope. But permafrost is not conducive to plant growth. It keeps the root zone cold, and "prevents the penetration of roots, resulting in a shallow, lateral root system. Permafrost prevents water percolation, so the active layer is boggy, poorly aerated, and improperly nourished."[25] This fragile vegetation insulates the permafrost; if disturbed, thawing and damage occurs. "Little alteration of the permafrost may occur through removal of trees or brush, but severe damage occurs when the moss or peat cover is disturbed. Vehicle traffic across tundra areas is a major cause of this type of disturbance. The resulting permafrost thaw and subsidence often leads to local flooding, drainage diversion and soil erosion."[26]

Because of the necessity to protect the surface vegetation from disturbance, vehicles and machinery can be used only during the winter months when the surface is frozen and covered with snow. The Alaska Department of Natural Resources issues land use permits for seismic operations, and places restrictions in oil leases. These authorizations contain standard restrictions which effectively limit those operations to the period between freeze-up and break-up, except on existing roads and

[25] Alaska Regional Profiles, supra, at 100.

[26] Id.

facilities.[27] Once a road or other facility is built it may be used year round.

Permafrost additionally imposes restraints on construction which are absent in other parts of the world. Just as disturbance of the protective vegetative mat will lead to thaw, erosion and environmental degradation, so will construction on permafrost lead to subsidence, icing, slumping and frost heaves, if proper steps are not taken to insulate the frozen soil. "Thawing of permafrost and cycles of freezing and thawing in the active layer damage highways, railroads, airstrips and other facilities."[28] Extensive on-site reconnaissance must be conducted before any construction project, without which "considerable risk of construction failure at worst and delayed construction schedules at best are inevitable."[29]

Once the extent and nature of the conditions are known, special consideration techniques must be used which may include thick gravel pads, elevation of pipelines and buildings on supports and pilings, the use of refrigerated pilings, and specially designed bridges. The

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[27] Typical restrictions are: "The use of ground contact vehicles for off-road travel must be limited to those areas which have adequate ground frost and snow cover to prevent damage to the ground surface." "After 15 April, the use of ground contact vehicles in wetlands and other areas of weak soil conditions (e.g., North Slope tundra) will be subject to termination within seventy-two (72) hours . . ." "Support vehicles must be operated in a manner such that the vegetative mat of tundra is not disturbed. Blading or removal of tundra is strictly prohibited, except as approved by the Director . . . Filling of low spots and smoothing by the use of snow and ice is allowed." Alaska Department of Natural Resources, Seismic Stipulations, Revised: November 1982. Leases contain similar restrictions.

[28] Alaska Regional Profiles, supra, at 103.

[29] Id.

engineering problems and unique solutions for the construction of TAPS are well known. But the best design is sometimes not good enough: "Alyeska Pipeline Service Company has begun a major modification of its buried pipeline crossing in the Dietrich River main channel. As a result of thawing in an undetected ice lens deep beneath the river bottom, settlement of the line has been severe enough to require repairs . . ."[30]

The restriction of construction and seismic activities to the winter months because of permafrost reduces the time available for exploration and development activities in permafrost regions to less than half the time available in other parts of the nation. Further, the time to which activity is restricted is the time of harshest climate. Temperatures in Alaska's interior commonly reach -40 to -50 degrees Fahrenheit; a low of -80 degrees Fahrenheit was recorded in 1971.[31] Cold temperatures are compounded by wind chill, particularly in coastal regions. It is difficult to quantify the effects of these climatic conditions on men and equipment working in them. A few examples will serve as illustration.

Vehicles, including cars, trucks, airplanes, all-terrain vehicles, tractors and cranes, must be prepared for and nursed through the cold. Keeping a car running through a Fairbanks winter can seem like a full-time job. After the common precautions of antifreeze and light oil are taken, many other steps are often necessary. A vehicle must be preheated in some manner before it will start—even light oil is nearly solid at -40 degrees Fahrenheit. Similarly, the battery must be warmed, as a battery at that temper-

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[30] Alaska Report, Petroleum Information Corp., Vol. 29, No. 8 (2-23-1983) at 2-3.

[31] Alaska Regional Profiles, supra at 15.

ature is next to useless. Tires inflated properly for operating temperatures deflate when cooled and freeze square on the bottom, creating a bumpy ride which jars both car and driver. Pliant seals which keep liquids in their proper places freeze and split, spilling liquids. Emergency brakes cannot be used, as the cable will lock and snap. Once started, a vehicle cannot be shut down for long away from home port or it will not restart.

Heavy protective clothing makes the simplest job clumsy and cumbersome. Uninsulated flesh cannot come into contact with metal or it won't come loose again, so valves and other moving parts must be designed so that they can be operated with thick mittens, or cumbersome tools must be used to work them. Overexertion results in frozen lungs from sucking in cold air or in perspiration which can freeze and endanger life. Protective goggles fog up and freeze to the face.

Teams of seismic crews moving over the winter terrain frequently become isolated from air support due to ice fog (as rivers freeze down, running water becomes compressed and breaks through the surface, evaporating quickly into dense frozen mist) or blizzards or blowing ground snow. Sometimes it is just too cold to fly.

The winter is also the time of darkness. The Arctic Circle is the latitude at which the sun does not breach the horizon on winter solstice. The higher the latitude, the darker the winter days. At Point Barrow, the sun does not come up at all from November 15 until January 25. Fairbanks has 3½ hours of sun on winter solstice, and Anchorage has 5½.[32] Since winter is the construction season, work must be done in the dark, or artificial lights

[32] Environmental Atlas of Alaska, supra, at 53.

used. Nowhere else in the United States is so dark in the winter.

The cumulative effects of these climatic conditions on oil development and production cannot be accurately estimated; but it is undeniable that they present a peculiar difficulty absent from more temperate climates.

## TRANSPORTATION

The existing surface transportation system in Alaska can be described in a few short sentences. Fairbanks is the northernmost population center, and it is slightly south, and a good deal east, of the center of the Alaskan land mass (excluding the Aleutian chain and the Southeast panhandle). The Alaska Highway comes northwest from Canada and terminates at Fairbanks. The Glenn Highway connects Anchorage with the Alaska Highway. The Parks Highway connects Anchorage and Fairbanks. These three highways, forming a triangle in the southeast quarter of the state, comprise the entire network of major highway transportation in the state. Minor highways go for short distances north from Fairbanks, south from Anchorage, and connect Valdez with the system. The TAPS haul road (not open to the public) parallels the pipeline north from Fairbanks to Prudhoe Bay. Truly bad roads can be traversed to Dawson (Canada), McCarthy and a handful of other locations. There are simply no roads west of Cook Inlet (Anchorage) or, with the exception of the haul road, north of the Yukon-Kuskokwim Rivers. Thus, the entire western and northern part of the state is accessible only by air. See map, Appendix A.

Rail transportation parallels the Parks Highway between Anchorage and Fairbanks, and continues south of Anchorage to Whittier. The Southeastern panhandle is served by a ferry system between that area and Seattle, and sea transportation is available to Anchorage. More

northern ports do not remain ice-free. This surface transportation system is outside the exempt area. See map, Appendix A.

Roadless areas in the contiguous United States are small pockets here and there in the general network of roads and highways. It is impossible to be more than 100 miles from a road in the lower 48 states. But a lack of surface transportation is the rule in the exempt portion of Alaska rather than the exception.

Lack of transportation affects not only the expense of exploration and production, but the value of the oil once it is produced. Thus, an Alaskan producer must add some $7 or $8 per barrel in transportation costs from the North Slope to his production costs when he competes in the market in the lower 48 states. His incentive to produce is affected by this consideration.[33]

SUMMARY

The State of Alaska has presented an overview of some of the factors which Congress perceived served to distinguish oil production in certain regions in Alaska from oil production elsewhere. Congressional recognition of the risks, difficulty and expense of production in these regions resulted in exemption from the tax. This exemption reflects the legislative judgment that "taxation of this production would discourage exploration and development of reservoirs in areas of extreme climatic conditions." H.R. Conf. Rep. No. 96-817, 96th Cong., 2d Sess. 103 (1980).

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[33] The WPT would reduce the removal price by this cost, but the effect of the disincentive is not eliminated by this treatment. See, Brief of Amicus Curiae Atlantic Richfield Company at footnote 27.

If severe climate, represented by the line of discontinuous permafrost, is considered in conjunction with access, within 100 miles, to existing transportation facilities, a line very close to the line drawn by the Alaska exemption emerges.[34] These circumstances, and others, set oil development in this region apart from similar activity anywhere else in the nation. Permafrost does not occur within the contiguous United States. There are no areas more than 100 miles from a road. The temperature does not reach -70 degrees Fahrenheit south of Canada. There are no completely dark days anywhere in the Lower 48. Within the United States, each of these factors is unique to portions of Alaska.

Each of these factors affects the nature of oil development and production activities, and is therefore a legitimate basis for a congressional distinction between oil production within the exempt area and other parts of the nation. None of these factors is based on a preference for Alaska as a political entity. Oil production in this area, thus, can properly be viewed as a separate subject from oil production elsewhere. As such, Congress may exercise its broad discretion and choose not to tax that subject. In so doing, it has exempted the subject wherever it occurs. It may, without violating the Uniformity Clause, address the peculiar "evil" presented by these factors and fashion legislation designed to cure that evil. The Alaskan exemption is constitutional.[35]

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[34] The transportation system in Alaska may change dramatically in the next century as the state becomes more settled. But the WPT expires of its own terms in 1993. Section 4990. Major additions to that network in that period will in all likelihood be a function of oil and gas development and financed by that industry.

[35] The State of Alaska takes no position on the severability of the Alaskan exemption if it is unconstitutional.

## CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

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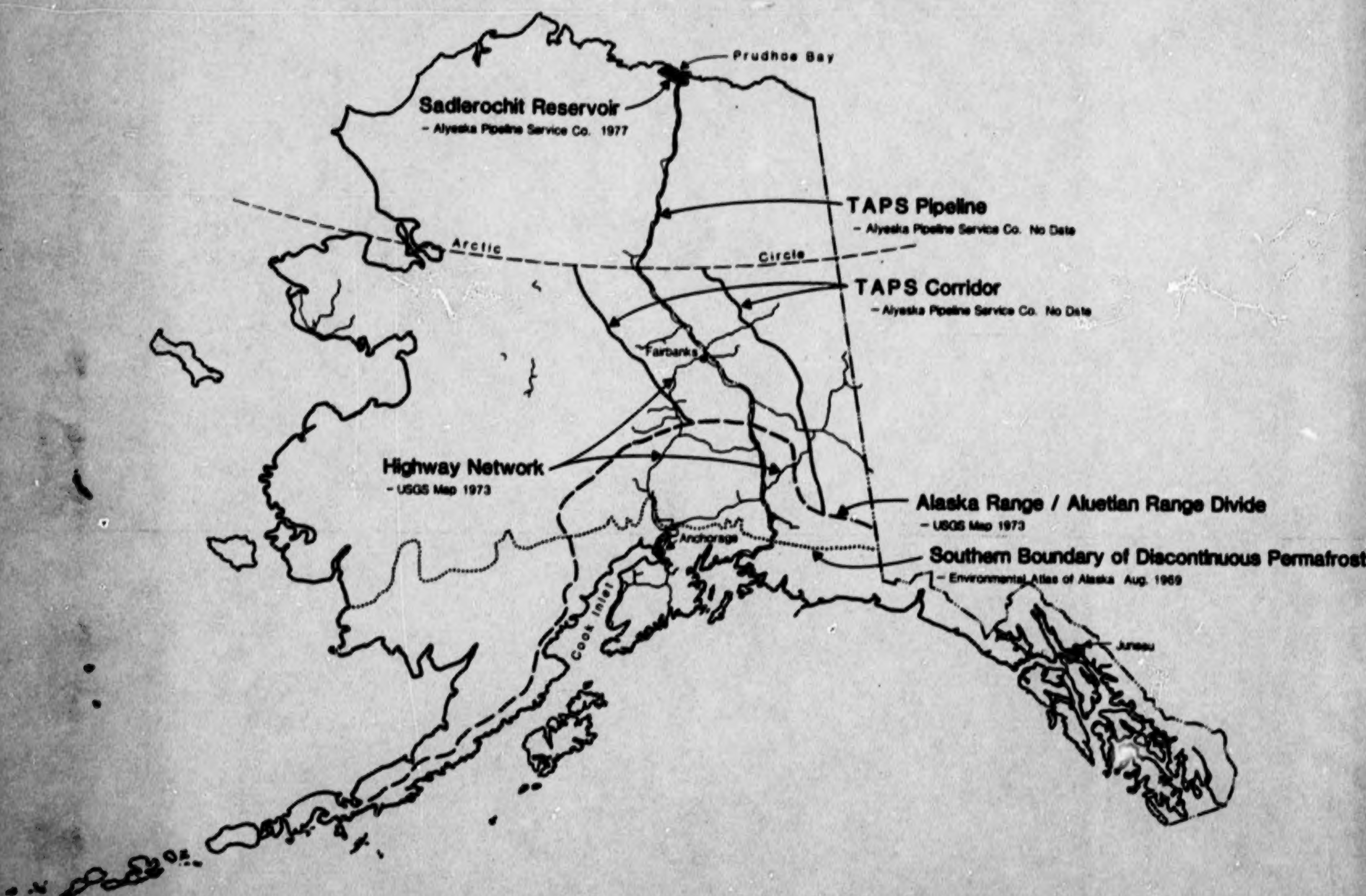

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No. 82-1066

# In the Supreme Court of the United States

October Term, 1982

UNITED STATES OF AMERICA,
*Appellant*,

v.

HARRY PTASYNSKI, et al.,
*Appellees*.

On Appeal From The United States District Court For The District Of Wyoming

## BRIEF AMICI CURIAE OF AMERICAN FARM BUREAU FEDERATION, WYOMING FARM BUREAU FEDERATION AND TEXAS FARM BUREAU IN SUPPORT OF APPELLEES

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## BRIEF AMICI CURIAE OF AMERICAN FARM BUREAU FEDERATION, WYOMING FARM BUREAU FEDERATION AND TEXAS FARM BUREAU IN SUPPORT OF APPELLEES

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The American Farm Bureau Federation, Wyoming Farm Bureau Federation and Texas Farm Bureau respectfully submit this brief *amici curiae*. Pursuant to Supreme Court Rule 36, this brief is filed with the written consent of the parties.

## INTEREST OF AMICI CURIAE

The American Farm Bureau Federation of 225 Touhy Avenue, Park Ridge, Illinois is a general farm organization organized in 1919 under the "General Not-For-Profit Corporation Act" of the State of Illinois. It has as its purposes the promotion, protection and representation of

the business, economic, social and educational interests of the farmers and ranchers in the United States. It has member State Farm Bureau organizations in 48 states and Puerto Rico, representing the interests of more than 3 million member families.

The Texas Farm Bureau is a member of the American Farm Bureau Federation and represents the interests of more than 306,000 member families in the State of Texas.

Wyoming Farm Bureau Federation is a member of the American Farm Bureau Federation and represents the interests of more than 8,000 member families in Wyoming.

Imposition of the so-called "windfall profit tax" has serious adverse repercussions on farmers and ranchers throughout the United States, because of its application to landowners (many of whom are Farm Bureau members) who own royalty interests in wells on their property.

Virtually forgotten during the debates on the windfall profit tax, royalty owners became unwitting subjects of the tax. The windfall profit tax was intended to minimize the passing of billions of dollars into oil company coffers as a result of crude oil price deregulation. Yet royalty owners, many of them struggling to make ends meet, found themselves taxed at the same high rate as Exxon, Standard Oil, and other major oil companies. Unlike large oil companies however, these small royalty owners are unable to pass the tax along or to minimize its effect by offsetting it against other investments. Moreover, as consumers, royalty owners are directly affected by supply and/or price variations that might be caused by the windfall profit tax.

The "economic interest" of royalty holders is different than the "economic interest" of the oil producers for whom the tax was intended. From a legal standpoint, the nature of the tax imposed on royalty interests is different

than the tax imposed on producer interests. This difference between "royalty interest" and "producer interest" is also relevant in evaluating whether there is a "rational basis" to support the Alaskan exemption.[1]

Because of these differences, the windfall profit tax should be reviewed in two separate contexts—as levied against producer interests and as levied against royalty interests. But both viewpoints are necessary for a consideration of the tax as a whole.

It is our intention to provide the viewpoint of the royalty holders. The interests of royalty holders were ignored during enactment of the windfall profit tax; they should not be overlooked upon its review.

## SUMMARY OF ARGUMENT

Title I of the Crude Oil Windfall Profit Tax Act of 1980 imposes a complicated excise tax on the removal and sale of domestically produced oil. The measure of the tax is the so-called "windfall profit" resulting from price decontrols.

Major targets of the tax were large oil companies who stood to reap increased revenues as a result of oil price decontrol. However, small royalty owners were also caught as unintended victims of the tax, subject to the same high tax rates as the large oil companies. The confusion appears to have been caused by the Act's definition of "producer," which has a broad meaning based upon federal income tax purposes instead of being defined for the speci-

[1] We hereby decline the invitation of the government to use the terms "North Slope exemption" or "Arctic exemption," preferring instead to employ the term used by Congress. Using the same terminology employed by Congress is more accurate and more indicative of Congressional intent.

fic excise at issue. Congress sought to solve this problem by a "band-aid" series of credits and exemptions for royalty interests, without addressing the real issue of whether royalty interests should have been taxed in the first place.

Royalty owners are not engaged in the production of oil. Rather, their "interest" derives from their giving up their interests in oil on their land. They receive compensation for granting this interest in the land, and the value of the interest is determined in part by the price of oil and the amount of oil taken from the land. For tax purposes, these payments have been construed as rents or income from the land, and not as interests in oil. Because the windfall profit tax imposes a levy on interests in oil, royalty holders are therefore outside the scope of the tax.

The specific exemption of certain Alaskan oil from taxation of "newly discovered oil" violates the requirement of geographic uniformity pursuant to Article I, Section 8, Clause 1 of the United States Constitution. The government seeks to justify the exemption on the basis that production costs for extracting this oil are extremely high, and that all producers are thus treated alike regardless of geographic location.

This justification is incorrect. Royalty owners do not share in the costs of oil production, and therefore the location of oil has no relevance with regard to them. Royalty owners in the lower 48 states are subject to tax on the increase in value of the property interest granted to their producers, while royalty owners in exempt Alaskan oil are not. Not only is the windfall profit tax not "geographically uniform" as applied to royalty interests, but there is no basis, rational or otherwise, for any different tax treatment.

## ARGUMENT

### I.

### ROYALTY INTERESTS WERE NOT INTENDED TO BE SUBJECT TO WINDFALL PROFIT TAXATION.

#### a) Windfall Profit Tax

Title I of the Crude Oil Windfall Profit Tax Act of 1980 (P.L. 96-223) created a complex tax on the production of domestic crude oil. A purpose of the tax was to prevent large oil companies from reaping excessive profits from the decontrol of domestic oil prices.

The tax is imposed on the removal and sale of domestically produced crude oil. The measure of the tax is the "windfall profit" from such oil (26 U.S.C. §4986), which is defined as the difference between the "removal price" (essentially decontrolled oil) and an "adjusted base price" (essentially controlled oil). The Act presents a complicated maze of tax rates which vary according to whether oil is classified as tier 1, tier 2 or tier 3; whether it is produced by large oil companies or independent producers; and whether it comes from Alaska or from the other 49 states.

The windfall profit tax was intended to raise large sums of revenue for the government, and the dollar amounts at stake are thus considerable.[2] The windfall profit tax was also part of a plan to increase production of domestic

[2] Of course, the financial stakes are not relevant to a determination whether the tax violates the United States Constitution, and this factor should have no part in this Court's review of the issues raised herein.

crude oil, which was the underlying purpose of the "Alaskan exemption."

The tax on the so-called "windfall profit" is to be paid by the "producer" of the oil [26 U.S.C. §4986(b)]. In a tax bill of such complexity and detail, the definition of "producer" stands out as being particularly ill-conceived and carelessly drawn. A "producer," for windfall profit tax purposes, is anyone who has an "economic interest" in the oil as defined for federal *income tax* purposes,[3] and includes large oil companies, independent producers, oil investors, and royalty owners.

However, the "economic interest" in oil that is subject to federal income taxation is not the same as the "windfall profits" interest subject to the windfall profit tax. The nature and extent of federal income taxation is more far-reaching than the nature and extent of federal windfall profit excise taxation. (U.S. CONST. amend. XVI; *Pollock v. Farmers' Loan and Trust Company,* 157 U.S. 429, 15 S.Ct. 673, 39 L.Ed. 759 (1895); *Brushaber v. Union Pacific Railroad,* 240 U.S. 1, 36 S.Ct. 236, 60 L.Ed. 493 (1916). The Sixteenth Amendment to the United States Constitution was specifically adopted to provide for taxation of "income" that could not be reached through "excises" such as the windfall profit tax, *Brushaber v. Union Pacific Railroad,* supra.

**b) Inclusion Of Royalty Holders In The Windfall Profit Tax.**

Royalty owners are landowners whose property contains the crude oil that is produced. They derive their "royalty interest" from payments by oil producers given in exchange for the privilege of being able to come onto

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[3] 26 U.S.C. §4996(a)(1)(A) and 26 CFR 150.4996-1(b)(1).

the property and drill for oil and for the exclusive rights to any oil so produced. Royalty owners generally have no control over how much oil is produced from their property, the manner in which it is produced, or the price at which it is sold.

It is estimated that there are more than two million royalty owners in the United States. A profile of the average royalty owner that emerged from field hearings on a bill to exempt small royalty owners from the tax[4] is in stark contrast to the giant oil companies at whom the tax was aimed.

Many of the royalty owners are farmers and ranchers who own the land upon which oil is produced. The vast majority of these people receive small incomes from royalties, many less than $100 per month.[5] Nevertheless, most royalty owners rely heavily on this small royalty income either to help defray the large operating expenses necessary to farm (especially in these times of depressed farm prices), or to plan for retirement. A significant number of royalty owners are already retired, and depend upon their royalty income for survival.[6]

For example, an analysis by West Texas Land and Royalty Owners Association of the royalty interests in

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[4] See *Royalty Owners Exemption From the Windfall Profit Tax: Hearings on S.2521 before the Subcommittee on Taxation and Debt Management Generally of the Senate Committee on Finance*, 96th Cong. 2d Sess. (1980).

[5] Id., at page 299 (Statement of Senator David Boren).

[6] Of the more than 4,000 who attended the field hearings, over 50% identified themselves as being retired, and 75-80% identified themselves as farmers. 127 Cong. Rec. S.9182 (Aug. 3, 1981) (Remarks of Sen. Dole).

the nation's largest unitized oil field produced the following results: in 97% of the property included, royalty interests were held by the farmer-landowner. The average size of the farms in the field was 140 acres. 78% of the royalty owners received less than $100 per month, and only 8% received more than $500 per month. Another survey conducted by the Association found that over 50% of royalty holders in the southwestern United States are over 65, and over 65% are over 60.[7]

The hearing record is replete with testimony and letters from such people. The windfall profit tax took as much as 30% or 40% of their total royalty checks, often resulting in extreme financial hardship.

### c) Subsequent Legislation

It soon became evident to Congressional leaders that they had completely overlooked the impact of the windfall profit tax on royalty owners. This realization is graphically illustrated in an exchange on the Senate floor between Senator Dole of Kansas (the ranking Republican on the Senate Finance Committee which heard the bill) and Senator Russell Long of Louisiana (the Chairman of the Senate Finance Committee).[8] Senator Dole acknowledged that during debates on the bill in Committee and in Conference "the focus was almost entirely on oil producers, whether they were independent producers or major

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[7] *Small Royalty Owners Exemption From the Windfall Profit Tax: Hearings on s. 2521 before the Subcommittee on Taxation and Debt Management Generally of the Senate Committee on Finance*, p. 346 (Statement of the West Texas Land and Royalty Owners Association).

[8] 126 Cong. Rec. S.3054-5 (March 26, 1980). Excerpts from that discussion are attached hereto as Appendix A.

companies,'"[9] and that royalty owners were not considered at all. Senator Long stated that by the time the bill was considered in Conference it was too late to remedy the situation, saying that "we did not have the language in conference that would make it possible for us to do for the benefit of royalty owners what I would like to have done.'"[10]

On the same day the windfall profit tax was signed by President Carter, Senator Dole introduced a bill (S.2521) to exempt small royalty owners from the tax. Senator Dole stated: "They were not the intended target of the windfall profit tax when it was first proposed, when it passed the Senate Finance Committee, or when it originally passed the Senate.'"[11]

In lieu of S.2521, a provision was hastily added in the Omnibus Reconciliation Act of 1980 (P.L. 96-499) giving royalty owners a tax credit of $1,000 against their windfall profit tax liability for 1980.

The Economic Recovery Tax Act of 1981 (P.L. 97-34) increased the tax credit to $2,500 for 1981. For subsequent years, the tax credit was replaced with an exemption from windfall profit tax on up to two barrels per day for 1982 through 1984, and up to three barrels par day for 1985 and thereafter. This action was taken because "imposition of the windfall profit tax on small amounts of royalty oil income may impose a hardship on many low and middle income taxpayers who are not recipients of the large oil company profits which lead, in part, to the windfall profit tax.'"[12]

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[9] Id.

[10] Id.

[11] See 126 Cong. Rec. S.3438 (April 2, 1980).

[12] *Senate Report* No. 97-144, p. 93.

These subsequent amendments temporarily alleviate some of the financial burdens of the windfall profit tax on royalty owners. However, because it was concerned with lessening the tax impact on royalty owners, Congress did not focus on the substantive differences between royalty interests and producer interests, and whether royalty owners were even proper subjects of windfall profit taxation at all.

Moreover, by merely reducing the taxation of royalty interests, Congress did not relinquish jurisdiction over them, and could still raise the tax on royalty interests to original levels or higher to suit revenue needs. Finally, these subsequent amendments provide little or no relief to windfall profit taxes paid on royalty interests prior to the enactment of these amendments.

## II.

## THE "ROYALTY INTEREST" DIFFERS FROM OTHER "ECONOMIC INTERESTS IN OIL."

Royalty owners are not engaged in the production of oil. They are landowners whose property contains the crude oil that is produced and refined. The royalty interest derives from an "oil and gas lease" between the landowner and a drilling company or other oil producer desirous of extracting oil from the property.

Pursuant to the lease, the landowner ("lessor") grants to the producer ("lessee") the right to enter the premises and to drill for and produce any oil found therein. The landowner further relinquishes any right, title or interest in any oil on his property in favor of the lessee. In exchange for the right to the oil and to enter upon the premises, the driller agrees to pay certain compensation to the landowner. Often the amount of compensation (which is

the value of the interest granted) is determined as a percentage of the value of the oil extracted. Compensation determined on this basis is called a "royalty."

Once the lease has been executed,[13] the landowner has no right to produce or control production of oil from his property, and is not involved with the actual production of the oil.

The royalty interest of the farmer and other landowners is therefore different than the "economic interests" of those engaged in actual oil production in a very fundamental respect. The "royalty interest" is derived from an interest in real property rather than from an interest in oil. In fact, the royalty interest arises from a landowner giving up any interest in the oil.

Royalty income is compensation for the granting of a real property interest, and not the reservation of an interest in oil. It is therefore in the nature of rent and income from real property, not in the nature of profit from the sale of oil. The significance of this distinction has important ramifications not only for federal windfall profit taxation but also for federal income tax purposes.

If "royalty income" derives from an "interest in oil" such income should be treated as the sale or disposition of a capital asset entitled to capital gains treatment. If, on the other hand, the royalty interest is "rents" or "income" from real property, it would be ordinary income.

The Court has addressed this issue on numerous occasions. In each case, the "royalty interest" has been held to be income from real property subject to ordinary in-

[13] Oil and gas leases are generally recordable in the Recorder's Office in the manner provided for recordation of real property interests.

come treatment rather than an interest in oil. *Von Baumbach* v. *Sargent Land Co.*, 242 U.S. 503, 37 S.Ct. 201, 61 L.Ed. 460 (1917); *Lake Superior Mines* v. *Lord*, 271 U.S. 577, 46 S.Ct. 627, 70 L.Ed. 1093 (1926); *Burnet* v. *Harmel*, 287 U.S. 103, 53 S.Ct. 74, 77 L.Ed. 199 (1932); *United States* v. *Biwabik Mining Company*, 247 U.S. 116, 38 S.Ct. 462, 62 L.Ed. 1017 (1918).

In *Von Baumbach* the Court stated that "the payments made by the lessees to the corporation now before the court were not in substance the proceeds of an outright sale of mining property, but in view of the terms of these instruments, were in fact rents or royalties to be paid upon entering into the premises and discovering, developing and removing the mineral resources thereof . . ."[14]

In *Burnet*, the Court found that "the payments made by the lessee are consideration for the right which he acquired to enter upon and use the land for the purpose of exploiting it, as well as for the ownership of the oil and gas . . ."[15] As a result, the Court concluded that "payments by lessees to lessors under mining leases were not a conversion of capital, as upon a sale of capital assets, but were income to the lessor, like payments of rent."[16]

In *Biwabik Mining*, the Court held that oil and gas leases "were not conveyances of the ore in place, but were grants of the privilege of entering upon, discovering, and developing and removing the minerals from the land."[17]

Whether royalty payments are made in kind rather than in cash does not alter the character of payment as "in-

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[14] 241 U.S. 521-2.

[15] 287 U.S. 111.

[16] 287 U.S. 108.

[17] 247 U.S. 123.

come." *Kirby Petroleum Co.* v. *Commissioner*, 326 U.S. 599, 66 S.Ct. 409, 90 L.Ed. 343 (1946); *Burton-Sutton Oil Co.* v. *Commissioner*, 328 U.S. 25, 66 S.Ct. 861, 90 L.Ed. 1062 (1946).

Royalty income is income from a real property interest, similar to rent. The value of this interest happens to be determined by the price of oil. Because the royalty interest is not an interest in oil, the royalty owner can have no interest in the "windfall profits" from such oil, and therefore cannot be held liable for payment of taxes thereon.

This Court's decisions holding that royalty income is rent or income from property rather than from an interest in oil already works a hardship on royalty owner taxpayers by not permitting them the more beneficial capital gains treatment. Royalty owners should not now be subject to an additional hardship based upon the opposite interpretation.[18] If subject to windfall profit taxation, royalty owners would have the worst of both worlds.

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[18] In this regard, American and Wyoming Farm Bureau Federations also argued *amici curiae* in the lower court that a tax on royalty interests was a tax on a real property interests and therefore more in the nature of a "direct" tax than an "excise" tax. *Pollock* v. *Farmer's Loan and Trust Company*, supra, and its progeny. (See generally Brief of Amici Curiae at Vol. II, pp. 479-515 of the Record on Appeal.) We do not wish to obscure the importance of the uniformity issue raised herein and therefore we have not reiterated our argument on the direct tax issue before this Court. However, if the Court were to reverse the lower court on either of the questions presented, we respectfully suggest that this Court might remand the direct tax issue to the lower court for full consideration.

III.

## THE WINDFALL PROFIT TAX IS NOT "UNIFORM THROUGHOUT THE UNITED STATES" AS REQUIRED BY THE CONSTITUTION OF THE UNITED STATES.

Farm Bureau submits that the district court correctly held that Title I of the Crude Oil Windfall Profit Tax Act of 1980 violated the Uniformity Clause of Article I, Section 8, Clause 1 of the United States Constitution. We further submit that the district court was correct in declaring the entire Title unconstitutional rather than severing the offending provision.

We believe that the position of Appellees and Intervenors on these issues is the correct one and we support and adopt their arguments in our brief. To avoid repetition these arguments will not be fully briefed herein.

### a) The Uniformity Clause Requires That "Subjects" Of Excise Taxation Be Taxed At The Same Rate Wherever They Exist Throughout The United States.

The rule of uniformity for purposes of excise taxation, set forth in Article I, Section 8, Clause 1 of the Constitution of the United States, was explained in the *Head Money Cases,* 112 U.S. 580, 5 S.Ct. 247, 28 L.Ed. 798 (1884). The Court stated that an excise is "uniform" if "it operates with the same force and effect in every place where the subject of it is found."[10] This rule was re-affirmed in *Knowlton* v. *Moore,* 178 U.S. 41, 84, 20 S.Ct. 747 (1900), where the Court, after a comprehensive review of the Uniformity Clause, declared that "wherever a subject is taxed anywhere, the same must be taxed everywhere throughout the United States, and at the same rate."

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[10] 112 U.S. at 594.

This clear statement of "geographical uniformity" is the test applicable in the present case.

Nevertheless, the government cites the *Head Money Cases* and the *Regional Railroad Reorganization Act Cases*, 419 U.S. 102, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974) in support of an argument that Congress may take geographical considerations into account in applying an excise tax. The *Regional Railroad Reorganization Act Cases* noted that the Uniformity Clause "does not deny Congress power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems."[20]

A careful reading of these and other cases does not, as the government contends, lead to the conclusion that Congress can apply excise taxes at different rates in different parts of the country. Rather, the "power" referred to is the "power" to *define* subjects of excise taxation in such a way as to achieve desired goals.

Congress has plenary authority over matters of federal taxation, subject only to the constitutional qualifications that direct taxes must be apportioned and excise taxes must be uniform throughout the United States, *The License Tax Cases*, 72 U.S. (5 Wall.) 462 (1867); *Pacific Insurance Co.* v. *Soule*, 7 Wall. 433, 19 L.Ed. 244 (1868); *McCray* v. *United States*, 195 U.S. 27, 24 S.Ct. 769, 49 L.Ed. 78 (1904). This plenary power over taxation includes the power to define subjects for taxation. Congress may define subjects of taxation as broadly or as narrowly as it desires. Subjects of excise taxation can be defined so narrowly as to exist in only one region of the country. But, once defined, a subject of excise taxation must be taxed at the same rate wherever it exists in the United States.

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[20] 419 U.S. 159.

In the *Head Money Cases*, an excise was levied on "all ports" of the United States. The tax classification was defined to include only coastal ports and to exclude inland cities and transportation terminals. The tax was designed to "take into account differences that exist between different parts of the country." Nevertheless, all U.S. "ports," as defined in the Act, were subject to the same tax at the same rate.

Likewise, in the *Regional Railroad Reorganization Act Cases*,[21] Congress selected as subjects for relief all railroads then under reorganization, even though all such railroads were located in one region of the country. The tax was designed to "resolve geographically isolated problems." Nevertheless, the law applied to all railroads throughout the United States then in reorganization, and was therefore "uniform throughout the United States."

In each case Congress exercised its legislative prerogative to define its subject classification in such a way to address certain specific problems. However, a common thread throughout these and other cases is that *the tax or relief was applied to every subject of the classification as defined by the tax, regardless of its location.* To this extent, the tax "operates with the same force and effect in every place where the subject of it is found," and is therefore "uniform throughout the United States."

Such is not true in the present case. One of the classifications of taxation under the Windfall Profit Tax is "newly discovered oil," which is generally defined as oil from

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[21] While the *Rail Reorganization* case construed the uniformity provision of the Bankruptcy Clause, the Court stated that its construction was the same as its construction of the Uniformity Clause applicable to excise taxes (95 S.Ct. at 367).

property which there was no production in 1978.[22] However, the tax is not imposed on all "newly discovered oil" at the same rate wherever it exists in the United States, because certain "newly discovered oil" in Alaska is not taxed at all. The tax is therefore not "uniform throughout the United States" as required by the Constitution.

This Court's recent decision in *Railway Labor Executives' Association* v. *Gibbons*, ........ U.S. ........, 102 S.Ct. 1169 (1982) illustrates this principle and clarifies the holding of the *Regional Railroad Reorganization Act Cases*. Although construing the Bankruptcy Clause, *Gibbons* is similar in many respects to the present case.[23]

The Court held the statute at issue (RITA) unconstitutional while at the same time re-affirming its statements in the *Regional Railroad Reorganization Act Cases*. The distinguishing factor cited by the Court is that the *Regional Railroad Reorganization Act* applied to *all* railroads then in reorganization, even though they were in one geographic area. RITA, on the other hand, applied to one specific railroad without regard to whether there were other railroads then under reorganization. In reconciling the principle of these two cases, the Court stated:

> "Our holding today does not impair Congress' ability under the Bankruptcy Clause to define classes of debtors and to structure relief accordingly. We have upheld bankruptcy laws that apply to a particular industry in a particular region. See *3 R Act Cases*, supra. The Uniformity requirement, however, prohibits

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[22] 26 U.S.C. §4991(e)(2) and *House Conference Report* No. 96-817, p. 97.

[23] The similarity extends to the fact that *Gibbons* represents the first bankruptcy law stricken on uniformity grounds. (102 S.Ct. 1176). So also, the government in this case states that the windfall profit tax is the first tax statute stricken on uniformity grounds. (J.S., p. 14).

> Congress from enacting a bankruptcy law that, by definition, applies only to one regional debtor. *To survive scrutiny under the Bankruptcy Clause, a law must at least apply uniformly to a defined class of debtors.*" (Emphasis added).[24]

So too, because the Alaskan exemption gives relief to one specific location of "newly discovered oil" without regard for other possible locations of "newly discovered oil," the statute must be declared unconstitutional.

The government's suggestion that Congress could have accomplished the same result by defining taxable oil in terms of weather conditions and nearness to transportation merely reinforces this conclusion. Had Congress defined taxable oil in those terms it would have exercised its legislative prerogative to narrow the definition of oil subject to taxation, and all oil throughout the United States meeting that definition would have been taxed alike. But that is not what Congress did. Congress chose instead to define "newly discovered oil" in general terms and then exempt certain "newly discovered oil" on the basis of geographical location. The result is a violation of the Uniformity Clause.

### b) The "Rational Basis" Argument Is Nothing More Than Intrinsic Uniformity.

The government contends that:

> "all oil producers who are similarly situated with respect to the purposes of the Windfall Profit Tax are treated alike regardless of their geographic location. This is the only uniformity the Constitution requires." (Brief for the United States, p. 10)

The argument is that Congress had a "rational basis" for excluding Alaskan oil because of its hardship on producers

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[24] 102 S.Ct. 1178.

and possible disincentives of such producers to develop Alaskan oil.

The argument focuses on the effects of the windfall profit tax on oil producers. As such, it is nothing more than a warmed-over version of the "intrinsic uniformity" argument specifically rejected by this Court in *Knowlton* v. *Moore*, supra.

The distinction between "intrinsic" and "geographic" uniformity is the focus of the uniformity sought to be achieved. "Geographic uniformity" focuses on the subject matter of the tax, for taxation of the subject at the same rate wherever it is located throughout the United States without regard to its effect on taxpayers. "Intrinsic uniformity," on the other hand, focuses on the effects of the tax on the taxpayers, lessening taxation of the subject matter in a particular location if it would have a particularly onerous effect on the taxpayer. (See *Knowlton* v. *Moore*, 178 U.S. at 84).

The Conference Report of the Windfall Profit Tax Act stated that the Alaskan exemption "reflects the concern of the conferees that taxation of this production would discourage exploration and development of reservoirs in areas of extreme climatic conditions."[25]

The concern of the conferees was that producers of Alaskan oil would bear a disproportionate burden if the windfall profit tax were applied to Alaskan oil. By seeking to equalize the impact of the tax on producers of Alaskan and other oil, Congress was focusing on the taxpayer rather than the subject matter of the tax.

We submit that this is therefore no different than the "intrinsic uniformity" standard defined, and rejected, in *Knowlton* v. *Moore*.

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[25] *House Conference Report* No. 96-817, p. 103.

## IV.

## THERE IS NO "RATIONAL BASIS" FOR THE ALASKAN EXEMPTION WITH RESPECT TO WINDFALL PROFIT TAXATION OF ROYALTY OWNERS.

The gist of the government's argument in support of the Alaskan exemption is that there was a "rational basis" for excluding this oil.

Leading cases construing the Uniformity Clause clearly indicate that the "rational basis" test has no application with regard to the "uniformity" requirement for excise tax purposes. *The Head Money Cases,* supra; *Knowlton* v. *Moore,* supra. The only "uniformity" required is that all subjects of an excise be taxed at the same rate wherever found in the United States.

Nevertheless, even if the "rational basis" test were applicable to the uniformity clause, there is no rational basis for the Alaskan exemption as it is applied to royalty owners.

### a) The Windfall Profit Tax Is Not Levied On "Profits" From Oil Production.

The government contends that the rationale for the Alaskan exemption is that any "windfall profit" received from production of Alaskan oil would be more than offset by higher production costs inherent in extracting that oil. As stated in their brief:

> "Moreover, Congress recognized that it was even more difficult to identify an element of 'windfall profit' appropriate for taxation in the case of 'North Slope' oil. Such oil was subject to extraordinary transportation costs, which served to reduce the wellhead price (and hence gross revenues) by \$6-8 per barrel, and extraordinarily high exploration and development costs,

> which were estimated at several times the cost of domestic exploration and development elsewhere." (Brief of United States, p. 9).

Implicit in this line of reasoning is the assumption that production expenses are taken into account when determining the "profits" subject to windfall profit tax.

This, however, is not how "windfall profit" is defined in the Act. Section 4988(a) of the Internal Revenue Code [26 U.S.C. §4988(a)] defines "windfall profit" as:

> "the excess of the removal price of the barrel of crude oil over the sum of—
>
> (1) the adjusted base price of such barrel, and
>
> (2) the amount of the severance tax adjustment with respect to such barrel provided by section 4996(c)."

"Removal price" is "the amount for which the barrel is sold." [26 U.S.C. §4988(c)(1)]. "Adjusted base price" is generally the price of oil in 1979, either under "controlled" or "uncontrolled" circumstances depending upon the tier classification. [26 U.S.C. §4989(a)].

Thus, "windfall profit" subject to taxation is essentially the difference between the present, uncontrolled price of oil and the price of oil as it was in 1979. It is based on increased "gross revenues" and not on an increase in "net profits." There is no provision in the Act to permit taking production costs into account in determining "windfall profit" subject to the tax.

Increased expenses for production of Alaskan oil therefore offers no basis for stating that there is no "windfall profit" on such oil. Without this, the rationale for the Alaskan oil disappears.

**b) There Is No "Rational Basis" For The Disparity In Tax Treatment Of Royalty Owners.**

The windfall profit tax that is levied upon royalty interests is not "uniform throughout the United States," as required by the Constitution of the United States, for the reasons set forth above and in the briefs of Appellees. Moreover, there is no "rational basis" for exempting "Alaskan oil" royalty interests from windfall profit taxation.

Royalty owners are not required to share in production or exploration costs of oil removed from their property. Therefore, the argument advanced by the government regarding increased exploration and production costs of Alaskan oil has no application to the windfall profit taxation of royalty interests.

Because the value of the real property interest granted to working producers is arbitrarily pegged at the price of oil, income received from royalty interests will vary according to the price of oil. This is true whether one lives within the boundaries of the Alaskan exemption or not. Presumably, the value of that real property interest will increase as a result of price decontrol. Royalty interests outside the Alaskan exemption are subject to windfall profit txation of this increased value; royalty interests within the Alaskan exemption are not.

It cannot be argued that since "working interests" in Alaskan oil are exempt from tax, it automatically follows that corresponding royalty interests must also be exempt. While the Act does not specifically address this issue with regard to exempt Alaskan oil, the Act does recognize a difference in tax treatment between "working interests" and "royalty interests."

The Act provides for special tax rates on a limited amount of oil know as "independent producer oil." (26

U.S.C. §4992). For "independent producer oil" of up to 1,000 barrels per day, tier 1 oil is taxed at 50% (instead of 70%) and tier 2 oil is taxed at 30% (instead of 60%). The rationale for the difference in tax treatment is to encourage domestic production by not deterring producers from incurring possibly greater production costs. Royalty interests are specifically excluded from the definition of "independent producers" because they do not share in these costs, and do not receive the benefits of lower tax rates.

The rationale for the independent producer exemption was essentially the same as that for the Alaskan exemption. The independent producer exemption, rightly or wrongly,[26] recognized a difference in working interests and royalty interests sufficient to warrant different tax treatment. Moreover, such differences were based on factors nearly identical to those considered in formulating the "Alaskan exemption."

It is thus apparent that windfall profit taxation of royalty interests is not geographically uniform throughout the entire United States. Nor is there any "rational basis" or any other reason advanced for this disparity. We submit that the Court should hold that windfall profit taxation of royalty interests is unconstitutional because it is not uniform throughout the United States as required by Article I, Section 8, Clause 1 of the Constitution of the United States.

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[26] We make no statement whether Congress was correct in treating royalty interests different than working interests for purposes of the independent producer classification. It is mentioned only to show that Congress treated them differently in circumstances similar to the Alaskan exemption.

## CONCLUSION

The lower court correctly interpreted and applied the "geographic uniformity" requirement of Article I, Section 8, Clause 1 of the United States Constitution in holding that the windfall profit tax was unconstitutional. Moreover, the court correctly refrained from "judicial legislation" in declaring all of Title I unconstitutional rather than severing the offending provision.

For these reasons, and the reasons set forth in this brief, the judgment of the lower court should be affirmed.

Respectfully submitted,

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## APPENDIX A

## EXCERPTS OF REMARKS REGARDING WINDFALL TAXATION OF ROYALTY HOLDERS

**(126 Cong. Rec. S. 3054-5, March 26, 1980)**

Mr. Dole. Second, when we debated the windfall profit tax in the Finance Committee, on the Senate floor, and even during conference, the focus was almost entirely on oil producers, whether they were independent producers or major companies. Nevertheless, as I stated previously, the conference report would impose a windfall profit tax not just on oil producers but also on countless numbers of royalty owers. At least in Kansas, these royalty owners are not generally wealthy individuals. They are farmers, scratching to keep their heads above water, or they are retired individuals who rely on royalty checks to supplement their social security, or they are young couples who have made an investment.

* * * * *

Mr. Dole. In other words, they are not rich. Particularly if they are farmers, they are not rich. They are having trouble breaking even, under the programs now in operation. They are losing money. Now they are about to get another tax, of which they may not have been aware.

These are not the people who, at least in all the early considerations of this proposal and all the early press coverage of this proposal, were being singled out for the tax. All the focus was on big oil companies and foreign oil profits and first quarter profits of the big oil companies.

As I said before, now we are going to treat royalty owners just as we treat big oil companies. They are going to pay the same rates as Exxon, Gulf, and others.

They are not the profiteers, and I do not suggest that the others may be profiteers, but some are described as profiteers. They are not the ones I do not believe who were intended to be the victims of this tax.

* * * * *

Mr. Dole. On a barrel of stripper oil selling for $38, a royalty owner would typically receive $4.75 royalty payment. After the imposition of the windfall profit tax, the royalty owners will have to pay a $1.71 tax on this royalty. Thus, the royalty owner's payment per barrel will be slashed from $4.75 to $3.04 by this tax, a 36-percent drop in income. Again, that is a substantial drop in income.

We are not discussing and have not discussed over a period of months what it would really mean to the royalty owner. We tried in the conference. The distinguished chairman tried in conference and the Senator from Kansas tried in conference to ease the burden on the royalty owners. We did not succeed. We did not have the votes.

Now we have one opportunity, and maybe we cannot change the conference report, but it would seem to this Senator it would make a great deal of sense and offer some comfort to the hundreds of thousands of royalty owners if they understood that they had not been forgotten and were going to continue to try to find some way to ease the tax burden on royalty owners across the country.

We should have given thought maybe to a 50 or 100-barrell-per-day exemption for royalty owners. It would seem that even a 50-barrel-per-day exemption or smaller would exempt most royalty owners, especially the little royalty owners in whose situation most of us can generate a great deal of sympathy.

So it would seem to me, I say to the chairman, and I do not address these questions to him, only as we have address them to all my colleagues who are going to get

to vote tomorrow, if we are unsuccessful in addressing the royalty owners concerns in this bill, I hope that we could in some future legislation in the immediate future find some way to exempt small royalty owners, if not totally, to exempt 50-barrels per day, 25-barrels per day. That would catch the truly small royalty owners and I hope that in the next few months we will have an opportunity, in fact in the next few weeks, to address this very serious problem.

* * * * *

Mr. Dole. It would be my hope that tomorrow morning we could, at least in an effort to indicate to the royalty owners and independent producers in this country that we do have a concern, send this bill back to the Finance Committee for 5 days or for 10 days to try to figure out some way to address the real problem that exists.

So tomorrow morning, I say to those who are about to vote, take a look at the number of royalty owners they have in their States, whether it is 10,000 or 50,000 or the number they could have in their States before they vote on the motion to send this back to the Finance Committee for a specified number of days.

* * * * *

Mr. Long. Unfortunately, we did not have the language in the Senate bill we needed. In other words, we did not have the language in conference that would make it possible for us to do for the benefit of royalty owners what I would like to have done.

The Bentsen amendment was accepted in the Senate Chamber and the Bentsen amendment exempted independent producers from the windfall profit tax. It also would have exempted the royalty owners who held royalty interests in those independent wells—about one in seven royalty owners.

In conference, the House of Representatives would not agree to the complete exemption of the independents, but it did give them a better tax break so that they paid a lesser rate than did the major companies.

* * * * *

MR. LONG. Mr. President, that latter situation I regret. That involves most of the royalty owners. I would love to give them the 30-percent break or not tax them at all, but that was not in conference. It was not in the Senate bill; it was not in the House bill, and a point of order could be made from either side that we had no right to do it because it was not in conference.

I would be happy to support a provision on some other measure to try to do something about that. I wish it had been offered here in the Chamber. I would have been happy to have voted for it. Looking back on it, I wish I had offered it myself. I would have liked to have done more for royalty owners and give them a better break, and I assure the Senator from Kansas (Mr. Dole) and all others that as we look at future opportunities I will vote to support measures to give the royalty owners, particularly those beneath stripper wells, a better break than they are getting at this point. I wish we could do better about them, but it was not in conference.

Even if we voted down the conference report and went back to conference with the House of Representatives, it would still be subject to a point of order in both the Senate and the House of Representatives because neither the House bill nor the Senate bill provided the consideration for those royalty owners, the 85 percent of them who have their royalty beneath the major company wells.

So, it simply was not within the rules of the Senate and House and the rules of conference to give them a better break than the House bill or the Senate bill would have given them.

In the future I hope we can do something about it, but it will have to be separate legislation and it will have to be initiated in one House or the other before the bill goes to conference. It cannot be initiated once a bill has been referred to conference.

No. 82-1066

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1982

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UNITED STATES OF AMERICA,
*Appellant*,
v.
HARRY PTASYNSKI, *et al.*,
*Appellees*.

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On Appeal from the United States District Court
for the District of Wyoming

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## BRIEF *AMICUS CURIAE* OF ATLANTIC RICHFIELD COMPANY

---

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**On Appeal from the United States District Court for the District of Wyoming**

---

## BRIEF *AMICUS CURIAE* OF ATLANTIC RICHFIELD COMPANY

---

This brief in support of appellant is submitted with the written consent of counsel to all parties filed with the Clerk of the Court.

### INTEREST OF THE *AMICUS CURIAE*

Atlantic Richfield Company and its subsidiaries ("Atlantic Richfield") have been extensively involved in exploration, production and transportation activities relating to oil located in the State of Alaska and on the Outer Continental Shelf adjacent to it. Atlantic Richfield took part in the discovery of the Prudhoe Bay field on the Alaskan North Slope, and is the operator for one half of Prudhoe Bay's Sadlerochit reservoir. It participated in the construction of the Trans Alaska Pipeline System, in which it owns a major interest.

Atlantic Richfield also is the operator of and primary producer from the Kuparuk River field on the Alaskan North Slope. Its share of total production over the life of that field is approximately 57 percent. Kuparuk River is the major reservoir now in commercial production that meets the criteria for the "Alaskan oil" exemption at issue in this case. Atlantic Richfield constructed a twenty-seven mile pipeline to connect the Kuparuk River field to the Trans Alaska Pipeline System and began production of Kuparuk oil in December 1981. It has invested almost $700 million in development of the Kuparuk River field, including transportation facilities, since enactment of the Windfall Profit Tax, and its current plans call for an ultimate investment of approximately $4 billion. Atlantic Richfield has increased the scope of its Kuparuk investments and accelerated their timing in reliance on the "Alaskan oil" exemption.

In addition to its current production of "exempt Alaskan oil," Atlantic Richfield holds a number of leases on potential oil producing tracts located within the areas covered by the exemption. It is now evaluating development of the Lisburne reservoir at Prudhoe Bay, additional reserves in the Kuparuk River field, and new reserves discovered in the Duck Island/Sag Delta area of the Beaufort Sea, off the Alaskan North Slope. Atlantic Richfield also owns significant leasehold interests elsewhere in the Beaufort Sea, as well as on the arctic coastal plain east of Prudhoe Bay and in the Tanana Basin, which is located below the Arctic Circle west of Fairbanks. It acquired these interests after enactment of the Windfall Profit Tax, at a total cost of approximately $36 million, and has conducted extensive exploration activities on them.

Given its substantial interests in areas covered by the "Alaskan oil" exemption, Atlantic Richfield faces the threat of increased windfall profit taxes—as well as reduced incentives to develop its affected holdings—if the exemption is declared invalid.

This brief *amicus curiae* is submitted solely in support of the position that the "Alaskan oil" exemption does not violate the Uniformity Clause. Atlantic Richfield does not support appellant's contention that the exemption is severable from the remaining provisions of the Windfall Profit Tax. Nor does Atlantic Richfield agree with the United States regarding other constitutional challenges to the tax that were presented below but are not before the Court in this appeal.

## SUMMARY OF ARGUMENT

Congress adopted the Crude Oil Windfall Profit Tax, Pub. L. No. 96-223, §§ 101-103, 94 Stat. 229-56 (1980), to deal with the anticipated effects of removing federal price controls on domestic crude oil. As enacted, the tax does not apply to a limited category of "exempt Alaskan oil," which is defined as oil—other than that from the Sadlerochit reservoir at Prudhoe Bay—(1) produced north of the Arctic Circle or (2) produced north of the divide of the Alaska-Aleutian Range and at least 75 miles from the Trans Alaska Pipeline System. I.R.C. §§ 4991(b)(3), 4994(e). It is important to recognize that the term "Alaskan oil" does not accurately reflect the actual reach or limitations of the exemption. On the one hand, the exemption extends to oil located outside the State of Alaska, on portions of the Outer Continental Shelf. On the other, the exemption does not apply to all oil produced in Alaska. Substantial areas of the state are simply outside the geographic scope of the exemption. In addition, "Sadlerochit oil" is expressly excluded from the exemption, an exclusion that in and of itself leaves the largest crude oil reservoir in the entire United States subject to the Windfall Profit Tax.

The "Alaskan oil" exemption does not violate the Uniformity Clause of article I, section 8 of the Constitution either because it applies to a portion of the oil located in one state or because it was drafted in geographic terms.

The Uniformity Clause reflects a general principle of federal-state relations, and was designed to prohibit only those taxes that have no basis other than preference for or discrimination against particular states. *Knowlton v. Moore*, 178 U.S. 41, 89 (1900). Congress has broad power to select appropriate objects of taxation, wherever they happen to be located. *See, e.g., Fernandez v. Wiener*, 326 U.S. 340, 352 (1945). It may create tax categories whose reach is geographically limited so long as there is a justification beyond mere favoritism among states. *Head Money Cases*, 112 U.S. 580, 594-95 (1884).

Congress enacted the Windfall Profit Tax to reach increases in crude oil prices made possible by decontrol while at the same time encouraging the discovery and development of new domestic oil reserves. It identified a number of categories of oil as to which costs, production difficulties or the prospects for new oil supplies made production incentives particularly necessary. Special tax treatment was provided for each of these categories, in the form of favorable base prices, reduced tax rates, or exemptions.

The "Alaskan oil" exemption was adopted as part of this overall classification scheme. Congress, for two principal reasons, concluded that special tax incentives were necessary to encourage the production of additional oil in the areas covered by the exemption. First, Congress understood that the price for which such oil could be marketed was substantially reduced by the costs of transporting it to refineries. Those costs, attributable to the combination of Trans Alaska Pipeline System tariff rates and marine transportation charges, are without parallel elsewhere in the United States. Second, Congress recognized that exploration and production in the region covered by the exemption involve higher risks and costs than are normally encountered elsewhere. Extreme weather

conditions, short construction seasons, the problems of working in permafrost areas, and the absence of support facilities combine to make operations in arctic and subarctic Alaska uniquely expensive and uniquely difficult.

Moreover, Congress was aware that the areas covered by the exemption offer significant prospects for the discovery of major new domestic oil reserves. It consequently determined that the national interest requires particularly strong incentives for exploration and production activities in those areas.

The "Alaskan oil" exemption was narrowly drawn in response to these considerations. It does not include oil from the Sadlerochit reservoir—by far Alaska's largest—or the Cook Inlet fields; as to each of these, Congress reasoned that cost or incentive factors did not justify an exemption. As a consequence of those exclusions, most of the oil currently produced in Alaska is subject to the Windfall Profit Tax. It is thus neither fair nor reasonable to say that Congress created the "Alaskan oil" exemption out of favoritism to that state.

Given that the "Alaskan oil" exemption constitutes a proper tax classification, it does not violate the Uniformity Clause merely because Congress chose to state it in geographic terms. The Constitution does not require Congress to avoid the use of geographic descriptions where they provide a clear and convenient means of identifying tax categories that are not substantively based on preference or discrimination among states. Congress created a category of "exempt Alaskan oil" in order to deal with a distinct situation that required distinctive treatment pursuant to the overall scheme of the Windfall Profit Tax. The Uniformity Clause should not be held to prevent Congress from taking such action based on its judgment as to the interests of the Nation as a whole.

## ARGUMENT

### I. THE UNIFORMITY CLAUSE DOES NOT PROHIBIT ALL TAX CLASSIFICATIONS APPLICABLE TO LIMITED GEOGRAPHIC AREAS

The court below construed the Uniformity Clause as imposing a strict prohibition on the use of geographic classifications for excise taxes. In its view, "[d]istinctions based on geography are simply not allowed." 550 F.Supp. 549, 553. Because the "Alaskan oil" exemption is defined in geographic terms, the court did not examine its purpose, effect or substantive relationship to other provisions of the Windfall Profit Tax.

The Constitution does not command a per se rule against geographic tax classifications. Neither the purposes for which the Uniformity Clause was adopted nor the cases interpreting it support an approach that focuses on geographic scope or terminology alone. The Constitution requires only that the exemption be a legitimate tax classification justified by objectives other than favoritism to one or more states. This is so regardless of the area the exemption affects or the terms by which Congress chooses to define it.

The Uniformity Clause reflects a general principle of federal-state relations. The Framers intended it only to prevent "possible discrimination against one or more states" in the federal government's exercise of its taxing power. *Knowlton v. Moore*, 178 U.S. at 89. It is doubtful whether the clause was intended to forbid any tax distinctions other than those that single out entire states, not merely portions of them, for special treatment.[1] It

[1] As this Court has observed, the Uniformity Clause was "one in purpose, one in . . . adoption" with the Port Preference Clause (U.S. Const. art. I, § 9, cl. 6). *Knowlton v. Moore*, 178 U.S. at 105; *see also* Motion of Taxpayer and Association Appellees to Affirm at

is clear, however, that the Uniformity Clause does not limit the power of Congress to identify distinct subjects of taxation, wherever they happen to be located.

This Court has consistently rejected efforts to employ the Uniformity Clause as a limitation on the ability of Congress to address specific problems through exercise of the taxing power. Cases dealing with the clause have confirmed, not restricted, Congress' "wide latitude in the selection of objects of taxation." *Fernandez v. Wiener*, 326 U.S. at 352 (citations omitted). Indeed, until the decision below, no federal tax ever had been held to violate the requirements of the Uniformity Clause.

Prior cases interpreting the clause have dealt with claims that excise taxes must be uniform in their effects. This Court has repeatedly held that the uniformity required is not intrinsic, but merely "territorial" or "geographic." *E.g.*, *id.* at 359 (estate tax); *Bromley v. McCaughn*, 280 U.S. 124, 138 (1929) (gift tax); *La Belle Iron Works v. United States*, 256 U.S. 377, 392 (1921) (excess profits tax). In drawing this distinction, however, the Court has never found that "geographic" uniformity requires an absolute prohibition against selecting objects of taxation that are located in limited areas or against defining them in geographic terms.

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13-14 ("the two provisions were aimed at exactly the same evil"). The Port Preference Clause has specifically been held to forbid "not discrimination between individual ports within the same or different States, but discrimination between States." *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 435 (1855); *see also Louisiana Pub. Serv. Comm'n v. Texas & N.O. R.R.*, 284 U.S. 125, 131 (1931); *Pacific Ref. Co. v. Department of Energy*, 455 F. Supp. 1091, 1093-95 (D. Del. 1978). The constitutional origins of the Uniformity Clause thus suggest that it was intended only to prohibit Congress from making taxes applicable in one entire state but not in another. *See also* 1 J. Story, *Commentaries on the Constitution of the United States* § 957, at 673 (3d ed. 1858).

To the contrary, the touchstone of uniformity has been that a tax "operates with the same force and effect in every place where the subject of it is found." *Head Money Cases*, 112 U.S. at 594. This test looks in the first instance to the "subject" of taxation selected by Congress. So long as that selection is supported by considerations distinct from favoritism among states, the Uniformity Clause is not violated merely because the subject of a tax exists in some states but not in others. *E.g.*, *id.*; *Knowlton v. Moore*, 178 U.S. at 108. The same rule necessarily applies where Congress limits its definition of a taxable object by modifying or eliminating the tax in certain contexts. *E.g.*, *Florida v. Mellon*, 273 U.S. 12, 15-17 (1927).[2]

It makes no difference that the distribution of the taxable object among the states is the result of geography alone. The tax upheld by this Court in the *Head Money Cases* presented exactly that situation. There, as part of "[a]n act to regulate immigration," Congress placed a duty on immigrants entering by ship through "any port within the United States." 112 U.S. at 589-90. Although immigrants also entered over land borders, the duty applied only to immigration by way of ports, which necessarily were located only in certain states.

The *Head Money Cases* did not deny the geographic distinction inherent in the tax, but held that Congress must be permitted to define appropriate subjects of taxation even if it knows they are limited to certain areas. As the Court squarely held, the Uniformity Clause requires only that the tax apply equally within the category Congress has selected as "the evil to be remedied." *Id.* at 594-95. If there are geographic areas in which the "evil" identified by Congress does not exist, their

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[2] In *Mellon*, the Court held that a federal inheritance tax providing a credit for state inheritance taxes did not violate the Uniformity Clause, even though some states did not impose inheritance taxes and could not do so under their state constitutions.

exclusion from the tax does not violate the constitutional requirement of uniformity. *Id.*[3]

The same rule must apply even where the classification is explicitly geographic. As the Court has recognized in an analogous setting, a constitutional requirement of uniformity "does not deny Congress power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 159 (1974).[4] The Court there upheld a bankruptcy law that applied "only in a single statutorily defined region," *id.* at 158, on the ground that the "crisis that produced the . . . Act centered . . . in the region defined by the Act," *id.* at 159.

In short, Congress may address geographically limited problems by means of statutory provisions that apply in

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[3] Thus, in the *Head Money Cases*, the Court deferred to the judgment of Congress that "the evil to be remedied by this legislation has no existence on our inland borders, and immigration in that quarter needed no such regulation." 112 U.S. at 595.

[4] Article I, section 8, clause 4 of the Constitution empowers Congress to "establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." This requirement is analogous to the mandate that excise taxes be uniform throughout the United States. *Regional Rail Reorganization Act Cases*, 419 U.S. at 160-61 (discussing the *Head Money Cases*). There is substantial evidence, however, that the Bankruptcy Clause restriction was intended to impose a more pervasive limitation on Congress than the Uniformity Clause. The federal government was given power over bankruptcies in order to "eradicate the opportunities for fraud and forum-shopping engendered by varying state insolvency . . . laws." *In re Penn Cent. Transp. Co.*, 384 F. Supp. 895, 915 (Regional Rail Reorg. Ct. 1974). *See also Railway Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 471-72 (1982). By contrast, the Uniformity Clause was intended not to "eradicate" variations in excise taxes throughout the Nation but rather to prevent political discrimination among states in the exercise of concurrent federal taxing powers. *See, e.g., Knowlton v. Moore*, 178 U.S. at 89; *see also supra* note 1.

specific geographic areas. "[T]he uniformity clause was not intended 'to hobble Congress by forcing it into nationwide enactments to deal with conditions calling for remedy only in certain regions.'" *Id.* (quoting *In re Penn Central Transportation Co.*, 384 F. Supp. at 915).[5]

Deference to the "wide latitude" Congress enjoys in drawing tax classifications does not deprive the Uniformity Clause of all effect. The classification adopted must be supported by more than a desire to prefer or discriminate against particular states.[6] A classification that covers "neither a defined class . . . nor a particular type of problem" may very well lack the requisite support. *See Railway Labor Executives' Association v. Gibbons*, 455 U.S. at 470-71.[7]

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[5] *Cf. Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 471 (1977) (Bill of Attainder Clause does not limit Congress "to the choice of legislating for the universe . . . or not legislating at all"). The Constitutional prohibition on bills of attainder, U.S. Const. art. I, § 9, cl. 3, is analogous to the uniformity requirements for excise taxes and bankruptcy laws in that it requires Congress to act "at a proper level of generality." *See* 433 U.S. at 469-72. *See generally* L. Tribe, *American Constitutional Law* §§ 10-4, 10-5, at 484-99 (1978). As the *Nixon* case squarely holds, the "proper level of generality" depends on Congress' specific goals, which may permissibly result in classifications of narrow scope, including "a legitimate class of one." 433 U.S. at 472.

[6] It is important to recognize that this standard is distinct from the "rational basis" test employed in equal protection analysis. *See, e.g., Schweiker v. Wilson*, 450 U.S. 221, 230 (1981). Congress conceivably might have a rational basis for imposing a tax selectively among the states. For example, it might conclude that general economic conditions in Michigan warrant exempting that state's inhabitants from a federal excise tax applicable in more prosperous states. While such a justification might be adequate for equal protection purposes, it would not necessarily satisfy the Uniformity Clause.

[7] *Gibbons* held that certain provisions of the Rock Island Transition and Employee Assistance Act lacked the uniformity required by the Bankruptcy Clause. The Court's holding was premised on its finding that those provisions, which applied "only to one regional

However, where Congress has identified the "evil" it intends to remedy and has selected a classification consistent with that goal, "simple reference to the breadth of the Act's focus cannot be determinative." *Nixon v. Administrator of General Services*, 433 U.S. at 470 n.31. Instead, the classification must be "viewed in context," so that "the focus of the enactment can be fairly and rationally understood." *Id.* at 472. The court below erred by considering only the geographic scope and terminology of the "Alaskan oil" exemption and thus failing to recognize that it is consistent with, supported by, and integral to the purposes for which Congress enacted the Windfall Profit Tax.

## II. THE "ALASKAN OIL" EXEMPTION IS CONSISTENT WITH THE POLICIES UNDERLYING THE WINDFALL PROFIT TAX AS A WHOLE

The Windfall Profit Tax is not, as the court below asserted, simply a tax on "the production and removal of domestic crude oil." 550 F.Supp. at 553. It is an excise tax on a distinct and more limited object of taxation that Congress identified by reference to several related policy objectives.[8]

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debtor" rather than to "a defined class," in effect constituted a "private bankruptcy law" of exactly the sort the uniformity requirement was intended to prohibit. 455 U.S. at 472-73. However, the Court expressly reaffirmed its holding in the *Regional Rail Reorganization Act Cases* that bankruptcy laws may "apply to a particular industry in a particular region." *Id.* at 473.

[8] As the statute itself declares, the Windfall Profit Tax is an excise tax. I.R.C. § 4986(a). It is imposed on the opportunity to receive price increases made possible by decontrol, rather than on the ownership of oil-producing property or the realization of income from oil sales. *See* 126 Cong. Rec. S3056 (daily ed. Mar. 26, 1980) (remarks of Sen. Long). The Windfall Profit Tax lacks the essential generic characteristics of an income tax—such as a requirement of realization or an annual or other accounting period for purposes of measurement—or any other form of direct tax. *See, e.g., Brown v. Helvering*, 291 U.S. 193 (1934); *MacLaughlin v. Alliance Ins. Co.*, 286 U.S. 244 (1932); *Burnet v. Sanford & Brooks*

Congress enacted the Windfall Profit Tax in response to the anticipated effects of removing federal price controls for domestically produced crude oil. Congress recognized that decontrol would permit domestic oil prices to rise to levels principally determined by the actions of the OPEC cartel. H.R. Rep. No. 304, 96th Cong., 1st Sess. 6-7 (1979), *reprinted in* 1980 U.S. Code Cong. & Ad. News 589; S. Rep. No. 394, 96th Cong., 1st Sess. 7 (1979), *reprinted in* 1980 U.S. Code Cong. & Ad. News 410. As a general matter, Congress concluded that those price increases were "an appropriate object of taxation." *E.g.*, *id.* at 6.

At the same time, however, Congress sought to encourage the discovery and development of additional domestic oil reserves in order to reduce the Nation's dependence on foreign supplies. *E.g.*, *id.* at 7. It recognized that the production of additional oil from certain sources would involve higher costs than might be anticipated generally. *E.g.*, *id.* at 27; 125 Cong. Rec. S18,841-42 (daily ed. Dec. 17, 1979). More important, Congress determined that special incentives would be necessary to encourage the development of certain vital categories of oil reserves. The legislation consequently was designed "to impose relatively high tax rates where production cannot be expected to respond very much to further increases in price and relatively low tax rates on oil whose production is likely to be responsive to price." H.R. Rep. No. 304, *supra*, at 7; *see also* S. Rep. No. 394, *supra*, at 2, 6-7, 9.[9]

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*Co.*, 282 U.S. 359 (1931); *Stratton's Independence, Ltd. v. Howbert*, 231 U.S. 399, 414-18 (1913); *Flint v. Stone Tracy Co.*, 220 U.S. 107, 150-52 (1911).

[9] While Congress' discussion was in the context of oil "production," it clearly had in mind the full range of activities that are necessary in order for oil to be produced. Those activities include exploration and field development (*e.g.*, drilling production wells and constructing gathering systems and other associated facilities) as well as actual production operations.

An integral feature of the Windfall Profit Tax thus is that it provides incentives for the production of additional domestic oil by means of "special tax treatment" for "categories of oil where the production response is likely to be the greatest, the windfall increases smaller, or production costs greater." *Id.* at 27. The classifications it draws reflect the judgment of Congress as to the balance of these factors with respect to various types of oil production. The treatment provided for "exempt Alaskan oil" was the product of that balancing process, consistent with the basic purposes of the tax as a whole.

The Windfall Profit Tax takes the special considerations applicable to different categories of oil production into account in several ways. The tax begins by isolating the "windfall profit" in terms of the price increase attributable to decontrol. That increment is measured by the difference between the decontrolled "removal price" and an "adjusted base price" for which the oil could have been sold prior to decontrol. I.R.C. § 4988(a).[10]

Even at this stage, Congress drew distinctions among certain categories of oil production. Domestically produced oil is divided into three "tiers," each having a different adjusted base price. Most oil is classified as "tier 1." *Id.* § 4991(c). Limited categories of production are placed in other tiers. "Tier 2" includes production from "stripper well propert[ies]" and from Naval Petroleum Reserves. *Id.* § 4991(d).[11] "Tier 3" covers production of

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[10] A further reduction is allowed for increased state severance taxes resulting from decontrol. *Id.* Section 4988(c) governs determination of the "removal price," the statutory term for the price actually or constructively received by the producer. The "adjusted base price," determined pursuant to § 4989, is intended to represent a pre-decontrol base price adjusted quarterly for inflation.

[11] As originally enacted, § 4991(d)(1)(B) referred to "National Petroleum Reserve[s]." Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223, § 101, 94 Stat. 229, 236. The term "Naval Petroleum Reserve" was substituted pursuant to the Technical Cor-

"newly discovered oil," "heavy oil," and "incremental tertiary oil." *Id.* § 4991(e) Higher adjusted base prices are provided for tiers 2 and 3, thereby reducing the price increment subject to the tax.[12]

Congress drew additional distinctions in setting the rates at which the "windfall profit" is taxed. First, different tax rates are applicable to each tier, with more favorable treatment given to the limited production categories assigned to tiers 2 and 3.[13] Second, reduced tax rates are provided for oil in tier 1 or tier 2 that also qualifies as "independent producer oil." [14]

Finally, Congress made certain categories of oil production exempt from the Windfall Profit Tax. *Id.* § 4991(b). Those exemptions are determined either by the identity of the producer [15] or the nature of the production.[16]

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rections Act of 1982. Pub. L. No. 94-448, § 201(c), 96 Stat. 2365, 2392 (1983).

[12] The base price for tier 1 oil is the May 1979 federal ceiling price for "upper tier oil" minus 21 cents. I.R.C. § 4989(c). The base prices for tier 2 oil and tier 3 oil are derived from the prices at which that oil would have sold in December 1979 under certain specified assumptions. *Id.* § 4989(d).

[13] The standard rates are 70 percent for tier 1 oil, 60 percent for tier 2 oil and 30 percent for tier 3 oil. I.R.C. § 4987(b).

[14] The independent producer oil rates are 50 percent for tier 1 oil and 30 percent for tier 2 oil. I.R.C. § 4987(b)(2). "Independent producer oil" is defined by § 4992, and generally involves production of no more than 1,000 barrels per day by producers that are not also engaged in refining or retailing operations.

[15] "[Q]ualified governmental interest," I.R.C. §§ 4991(b)(1), 4994(a); "qualified charitable interest," §§ 4991(b)(1), 4994(b); "exempt Indian oil," §§ 4991(b)(2), 4994(d). These exemptions were provided "to avoid imposing a tax burden on income devoted to public purposes." S. Rep. No. 394, *supra* p. 12, at 2.

[16] "[E]xempt Alaskan oil," §§ 4991(b)(3), 4994(e); "exempt front-end oil," §§ 4991(b)(4), 4994(c).

These categories within the Windfall Profit Tax demonstrate that Congress carefully determined the extent to which special production incentives would be necessary in specific contexts. For example, "newly discovered oil" was placed in tier 3, subject to a 30 percent tax on the lowest level of "windfall profit" under the statutory computation.[17] This favorable treatment was based on the need to encourage the discovery of new domestic oil reserves and on a recognition that future exploration and production activities will generally involve higher costs than existing production. *See, e.g.*, 125 Cong. Rec. S17,269 (daily ed. Nov. 27, 1979) (remarks of Sen. Schmitt); 125 Cong. Rec. S17,496 (daily ed. Nov. 29, 1979) (remarks of Sen. McClure). Similarly, "heavy oil" was given tier 3 treatment in light of the special technology and high production costs required for the extraction of "more tar-like" low gravity crude oil. S. Rep. No. 394, *supra* p. 12, at 51; *see also* 126 Cong. Rec. H1841 (daily ed. Mar. 13, 1980) (remarks of Rep. Thomas).[18] By comparison, "stripper well" production, which involves the continued operation of wells that yield small volumes of oil, was placed in tier 2.[19] While stripper well operations

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[17] Congress subsequently determined that an even lower tax rate should apply. The Economic Recovery Tax Act of 1981 provided that the rate for "newly discovered oil" would be reduced from 30 percent to 15 percent over the years 1982-1986. Pub. L. No. 97-34, § 602, 95 Stat. 172, 337-38 (codified at I.R.C. § 4987(b)(3)(B)).

[18] The "heavy oil" category illustrates that classifying various types of production according to cost necessarily involved distinctions having geographically limited effects. As Congress recognized, "[m]ost of this oil is located in California." S. Rep. No. 394, *supra* p. 12, at 51. However, there has been no suggestion that the purpose of placing heavy oil in tier 3 was to favor the State of California, in violation of the Uniformity Clause, rather than to recognize the special costs of heavy oil production.

[19] A "stripper well" is one from which the average daily production does not exceed 10 barrels. *See* S. Rep. No. 394, *supra* p. 12, at 37.

do not normally require exploration efforts, new facilities or high-cost technology, this treatment recognizes that the per-barrel costs of producing small volumes of oil may be greater than those for normal production volumes, and that producers might shut in or abandon low-production wells without some form of tax incentive. *See* S. Rep. No. 394, *supra* p. 12, at 37-42.

The balancing process in which Congress was engaged is most evident from the cumulative effects of the statutory categories. For example, the costs of producing oil from "stripper well properties" were determined to merit only tier 2 treatment, subject to a tax rate of 60 percent. However, the additional need Congress perceived for incentives to encourage activity by independent producers resulted in a 30 percent rate for independent producer oil from stripper wells.[20] Indeed, Congress subsequently determined that those combined considerations warrant the complete exemption of all stripper well oil produced by independents.[21]

Similarly, Congress sought to encourage the production of additional oil by means of enhanced or "tertiary" recovery techniques. *E.g.*, 125 Cong. Rec. S18,841 (daily

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[20] Congress provided special incentives for independent producers based on its conclusions regarding the economics of independent operations and their importance to the development of new oil reserves. Congress found that the absence of vertical integration or other diversification on the part of independents magnified the already substantial risks of exploration and production. *See, e.g.*, 126 Cong. Rec. S2629 (daily ed. Mar. 19, 1980) (remarks of Sen. Gravel); *see also* 125 Cong. Rec. S16,845-46 (daily ed. Nov. 16, 1979) (remarks of Sen. Dole). Furthermore, Congress determined that "independent producers generally have undertaken a disproportionately large share of domestic exploratory drilling," S. Rep. No. 394, *supra* p. 12, at 27, and should be encouraged to continue those efforts. *See also* 125 Cong. Rec. S17,268-85 (daily ed. Nov. 27, 1979).

[21] Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 603, 95 Stat. 172, 338 (codified at I.R.C. §§ 4991(b)(6), 4994(g)).

ed. Dec. 17, 1979) (remarks of Sen. Randolph).[22] As an incentive for increased production from tertiary recovery projects, it gave tier 3 treatment to certain "incremental" volumes of oil produced by them. *See* Congressional Budget Office, *The Windfall Profits Tax: A Comparative Analysis of Two Bills* 34 (Nov. 1979).[23] However, Congress also recognized that tertiary recovery projects are "capital-intensive and high-risk" in nature, and concluded that additional incentives were needed to encourage their implementation. *See* 125 Cong. Rec. S18,841 (daily ed. Dec. 17, 1979) (remarks of Sen. Heflin). It consequently provided even more favorable tax treatment for a portion of the oil produced by tertiary recovery projects. I.R.C. §§ 4991(b)(4), 4994(c) ("front-end tertiary oil"). Based on its determination that incentives were particularly necessary for independent producers, Congress provided an exemption for "front-end oil" from tertiary projects controlled by independents; however, it provided a more limited incentive, in the form of a tax refund, for projects controlled by integrated producers. *Id.*

The "Alaskan oil" exemption reflects a similar balancing process. The treatment provided by the exemption follows logically from the principles and policies on which the entire Windfall Profit Tax is structured. Thus, when "viewed in context, the focus of the enactment can be fairly and rationally understood" as one that is entirely consistent with the mandates of the Uniformity Clause. *See Nixon v. Administrator of General Services*, 433 U.S. at 472.

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[22] Tertiary oil recovery involves additional production from reservoirs that already have produced more easily extracted volumes of the oil they contain. It requires the application of sophisticated and expensive methods, such as "technologies that use heat or chemical compounds." 125 Cong. Rec. S16,864 (daily ed. Nov. 16, 1979).

[23] "Incremental tertiary oil" is oil produced in excess of the volumes anticipated on the basis of a project's historical production reduced by a statutory decline rate. I.R.C. §§ 4991(e), 4993.

Congress did not make an arbitrary leap from full taxation to exemption for "Alaskan oil." Even without the exemption, the oil to which it applies would receive highly favorable tier 3 treatment as "newly discovered oil." [24] When Congress took into account the combination of factors that distinguishes new production in certain areas of Alaska from new domestic production generally, it merely determined not to impose what already was the lowest level of tax burden provided for under the statute. On the basis of those distinguishing factors, Congress placed "Alaskan oil" in a separate category that in effect might be viewed as "tier 4."

In creating this separate category, Congress recognized that oil produced in the remote areas of arctic and subarctic Alaska could not yield the same sort of gains that decontrol would make possible for oil produced elsewhere in the United States. The relatively high cost of transporting oil from remote Alaskan regions by means of the Trans Alaska Pipeline System and ocean-going tankers substantially reduces the price that can be obtained for such oil at the wellhead. *E.g.*, H.R. Rep. No. 304, *supra* p. 12, at 30.[25] Thus, throughout most of the period of

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[24] Oil is treated as "newly discovered" for purposes of the Windfall Profit Tax if it comes from a reservoir that went into commercial production after December 31, 1978. *See* I.R.C. § 4991(e)(2); 10 C.F.R. § 212.79(b) (1980); 44 Fed. Reg. 25,828, 25,832 (1979). Atlantic Richfield began the first commercial production covered by the exemption in December 1981. Thus, all "exempt Alaskan oil" also would qualify as "newly discovered oil."

[25] At the time Congress enacted the Windfall Profit Tax, the cost of transporting oil over the Trans Alaska Pipeline System was the primary source of the wellhead price differential for North Slope oil. In 1978, when the difference between the wellhead price available on the Alaskan North Slope and the uncontrolled price in the lower-48 states was \$8-\$9 per barrel, the weighted average TAPS tariff was \$6.26 per barrel. H.R. Rep. No. 304, *supra* p. 12, at 30. By contrast, the average cost of transporting oil over pipelines other than TAPS for that year was only 42 cents. *See Williams Pipe Line Co.*, Federal Energy Regulatory Comm'n Opinion No.

federal price controls, North Slope oil could not even obtain the wellhead price allowed by regulation.[26] Moreover, as Congress clearly understood, the price commanded at the wellhead by oil produced on the North Slope or in other remote areas of Alaska was expected to remain substantially below the decontrolled price available to producers in the lower-48 states. *See id.*; *see also* 125 Cong. Rec. S17,479 (daily ed. Nov. 29, 1979) (remarks of Sen. Stevens); *Design of a Windfall Profit Tax*, *supra* note 26, at 20-21.

The effects of transportation costs on the wellhead price for "Alaskan oil" meant that producers would have less of an incentive to develop new oil reserves in the affected areas. While discoveries elsewhere could be expected to yield wellhead prices close to the prevailing world oil price, oil discovered in the Alaskan regions dependent on TAPS and marine transportation offered wellhead prices at least $8 lower.[27]

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154, at 189 (Nov. 30, 1982), *petition for review filed sub nom. Farmers Union Cent. Exch. v. FERC*, No. 82-2412 (D.C. Cir. Nov. 30, 1982). Recently, marine transportation charges from Alaska have risen to approximately the same levels as the TAPS tariff charges.

[26] As the House Ways and Means Committee pointed out, "[i]n 1978, when the price of uncontrolled stripper well oil was $14 per barrel and Alaska's upper tier ceiling price was about $12 per barrel, Alaskan [North Slope] oil sold for $5.22 per barrel at the wellhead." H.R. Rep. No. 304, *supra* p. 12, at 30; *see also* Staff of the Joint Comm. on Taxation, 96th Cong., 1st Sess., *The Design of a Windfall Profit Tax* 20-21 (Comm. Print 1979) [hereinafter cited as *Design of a Windfall Profit Tax*]; 125 Cong. Rec. S17,479 (daily ed. Nov. 29, 1979) (remarks of Sen. Stevens). North Slope wellhead prices did reach the ceiling level in the second half of 1979. However, because of high transportation costs, the wellhead price for North Slope oil was in general expected to be far below wellhead prices in the lower-48 states after decontrol.

[27] That disincentive would not have been eliminated or even substantially reduced by the fact that the wellhead price is used to compute the taxable "windfall profit." *See* Motion of Taxpayer and

Congress was unwilling to accept this disincentive for new Alaskan production. To the contrary, it recognized that such production would involve unusual risks and costs and consequently would require special incentives. As the legislative debate emphasized,

> Development and production of [Alaskan] reserves . . . is by all accounts expensive and difficult. Short construction seasons and the effects of severe arctic winters take their toll on men and equipment. Special steps must be taken to preserve a fragile arctic environment. The costs of transportation and labor are high.

125 Cong. Rec. S17,422 (daily ed. Nov. 28, 1979) (remarks of Sen. Stevens); *see also* 125 Cong. Rec. S16,327 (daily ed. Nov. 8, 1979) (remarks of Sen. Gravel). Each of these considerations makes the risks and costs of Alaskan production far greater than those encountered generally in the lower-48 states.[28] Moreover, each of them poses more acute problems in the remote arctic and sub-

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Association Appellees to Affirm at 11 n.17. This is so because a dollar reduction in the wellhead price will reduce the windfall profit tax by only a fraction of a dollar. For example, using appellees' assumptions that the "mainland wellhead price" is \$28 and transportation costs for "exempt Alaskan oil" are \$8, the wellhead price for the exempt oil would be \$20 per barrel. *Id.* Assume further that all "newly discovered oil," wherever located, is treated as "tier 3 oil," subject to a 30 percent tax rate, and that the "adjusted base price" for newly discovered tier 3 oil is \$18. The respective windfall profit taxes would be \$0.60 per barrel for "Alaskan oil" [(20 − 18) x .3] and \$3.00 per barrel for other newly discovered oil [(28 − 18) x .3]. A producer thus could expect to obtain only \$19.40 at the wellhead, net of windfall profit tax, for each barrel of "Alaskan oil" it discovered, but could expect a corresponding price of \$25.00 for each barrel of oil discovered elsewhere.

[28] *See* 126 Cong. Rec. S2630 (daily ed. Mar. 19, 1980) (remarks of Sen. Gravel) ("The cost of drilling a well in Alaska is 15 times greater than the cost of drilling a well in the rest of the United States."); *see also* 126 Cong. Rec. S2620 (daily ed. Mar. 19, 1980) (remarks of Sen. Boren).

arctic regions of Alaska than elsewhere in the state. *See* 126 Cong. Rec. S2630 (daily ed. Mar. 19, 1980) (remarks of Sen. Gravel).

Climatic conditions alone create distinctive burdens. For example, the number of days during which exploration and construction activities can be conducted is sharply limited by severe winter weather conditions as well as by the brevity or absence of daylight during winter months. In addition, specialized equipment and techniques are required to deal with such problems as drilling and constructing facilities for production and transportation in permafrost regions.[29]

These problems are compounded by the absence of support facilities. In order to explore for and develop oil reserves in the remote regions of Alaska, producers must establish their own means of bringing labor and materials to work sites. For example, major items necessary for exploration and production on the North Slope must be prefabricated in the lower-48 states and barged to Alaska at enormous risks and costs during the extremely brief period in which harbors are ice-free.[30] Again, this lack of support facilities or "infrastructure" is without parallel in the lower-48 states.

Climate and logistical difficulties thus make activities in the areas covered by the exemption far more costly—

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[29] A substantial portion of the land area of the State of Alaska is underlain by permafrost. The areas that are completely free of permafrost are virtually all located south of the divide of the Alaska-Aleutian Range. *See* 2 U.S. Dep't of the Interior, *Final Environmental Impact Statement: Proposed Trans-Alaska Pipeline* 8 (1972).

[30] Furthermore, the areas covered by the exemption contain virtually no ground transportation facilities. The only route substantially beyond Fairbanks is the haul road alongside the Trans Alaska Pipeline. Equipment, personnel and supplies consequently must be transported to inland work sites by air or over new roads that must be constructed in hostile terrain.

in terms of initial and ongoing capital investment as well as operating expense—than exploration and production elsewhere in the United States. Congress recognized not only that this cost differential was substantial for existing projects such as Sadlerochit oil production,[31] but also that it was likely to be even greater for oil covered by the exemption. *See, e.g., Design of a Windfall Profit Tax, supra note* 26, at 22.

Congress also was aware that the region covered by the "Alaskan oil" exemption was a particularly important one in which to encourage exploration and production. The largest oil field in the United States was discovered at Prudhoe Bay, and many of the most promising prospects for the discovery of major new oil reserves are located in the same region.[32] Congress thus sought to spur the discovery and development of reserves that would be of sufficient magnitude to decrease the Nation's dependence on foreign sources over the long term.

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[31] *See, e.g.,* 126 Cong. Rec. S2630 (daily ed. Mar. 19, 1980) (remarks of Sen. Gravel):

> The cost per hour of a production worker on the North Slope of Alaska is more than four times that of a comparable worker elsewhere in the United States. . . . Salaries on the North Slope must be much higher because of its remoteness, hard weather, and isolation. Employees have a built-in overtime component because of the hours worked while on the Slope. . . . Finally, [under established work schedules] an employee must be transported from Anchorage 800 miles to the work site and back 25 times per year at employer expense.

[32] More than 20 percent of the mean undiscovered recoverable crude oil reserves in the United States, amounting to an estimated volume of over 17 billion barrels, have been attributed to areas covered by the "Alaskan oil" exemption. *See* U.S. Dep't of the Interior, *Geological Survey Circular 860, Estimates of Undiscovered Recoverable Conventional Resources of Oil and Gas in the United States* 22, 74-79 (1981). As of the time Congress considered the Windfall Profit Tax, exploration for possible oil and gas reserves had not taken place in 13 of the 15 sedimentary basins in Alaska. 125 Cong. Rec. S17,478 (daily ed. Nov. 29, 1979) (remarks of Sen. Stevens).

In sum, considerations of geology, environment and economics, not geography, led Congress to conclude that "taxation of this production would discourage exploration and development of reservoirs" in the areas covered by the exemption, H.R. Conf. Rep. No. 817, 96th Cong., 2d Sess. 103 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 642, and that particularly attractive incentives would be necessary to encourage such exploration and development. The combined effects of transportation costs, production costs and the prospects for major new oil supplies persuaded Congress that the appropriate incentive for the production of "Alaskan oil" was exemption from the Windfall Profit Tax.

The limited scope of the exemption confirms that Congress acted on the basis of standards underlying the entire Windfall Profit Tax, rather than out of favoritism for one state. The exemption applies only to Alaskan oil that must be transported lengthy distances via TAPS, ocean-going tankers or other facilities yet to be constructed. Oil located near existing support and transportation facilities south of the Alaska and Aleutian Ranges is not exempted. Nor does the exemption cover oil located south of the Arctic Circle—outside of the most hostile environment—and within 75 miles of TAPS. Finally, the exemption specifically excludes oil produced from the Sadlerochit reservoir at Prudhoe Bay, which currently has a production rate fifteen times that of the Kuparuk River field and is expected to produce more than 9 billion barrels of crude oil over the life of the field. That exclusion was based on Congress' determination that the unit costs of production for Sadlerochit oil are not as high as those that may be anticipated for future production in the same area, and that, in any event, no special production incentives were necessary with respect to oil that already was flowing prior to enactment of the Windfall Profit Tax. *See Design of a Windfall Profit Tax, supra* note 26, at 22.

These limitations are substantial ones. The exclusion of Sadlerochit oil alone meant that no exemption was given for the largest known reservoir in the United States and the only field in the exempt region from which oil was produced in commercial quantities before December 1981. By placing the southern boundary of the exempt region at the divide of the Alaska-Aleutian Range, moreover, Congress excluded the only other major producing area in Alaska, the Cook Inlet.[33] Congress did not single out the entire State of Alaska for special tax treatment in violation of the Uniformity Clause. *See supra* note 1. Instead, it drew a narrow tax classification in response to the special circumstances affecting certain oil, only part of which is located in that state.[34]

The limited scope of the "Alaskan oil" exemption and its clear consistency with the policies underlying the Windfall Profit Tax as a whole thus demonstrate that the exemption embodies a permissible legislative distinction among subjects of taxation. *See Head Money Cases*, 112 U.S. at 594-95. The exemption is no less valid because Congress chose to state it in geographic terms. The combination of factors that led Congress to provide special treatment for "exempt Alaskan oil" is unique to the areas the exemption covers.[35] As this Court has recognized, the

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[33] The Cook Inlet is located immediately southwest of Anchorage and opens into the Gulf of Alaska. Oil is produced both on the west shore of the inlet and from offshore platforms.

[34] As appellant has noted, the "Alaskan oil" exemption extends to oil that is within the exclusive jurisdiction and control of the United States by reason of being located on the Outer Continental Shelf more than three miles beyond the State's coastline. *See* Jurisdictional Statement at 17 n.24. Several of the tracts Atlantic Richfield holds in the areas covered by the exemption are located on the Outer Continental Shelf, in the Beaufort Sea.

[35] There is no evidence that Congress was or should have been aware of any other oil whose production would involve the same set of considerations. At most, appellees have contended that a valid tax classification covering "exempt Alaskan oil," but not expressed

Constitution does not forbid Congress from dealing with such geographically limited problems in expressly geographic language. *See Regional Rail Reorganization Act Cases*, 419 U.S. at 158-59. The "Alaskan oil" exemption meets the substantive demands of the Uniformity Clause, and should not be held invalid merely because it employs "words readily intelligible . . . rather than circumlocutions that would have had exactly the same effect." *In re Penn Central Transportation Co.*, 384 F. Supp. at 916.

## CONCLUSION

The judgment of the United States District Court for the District of Wyoming should be reversed.

Respectfully submitted,

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in geographic terms, might also exempt oil produced in other states. *See, e.g.*, Motion of Taxpayer and Association Appellees to Affirm at 10 (a "'cold weather' exemption would . . . be likely to benefit areas of states other than Alaska"); Motion of the State of Louisiana to Affirm at 13 n.7. Those arguments, however, depend on isolating individual factors, such as climate, that were only part of the combination of factors on which Congress relied.

No. 82-1066

IN THE

# Supreme Court of the United States

October Term, 1982

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UNITED STATES OF AMERICA
Appellant,

v.

HARRY PTASYNSKI, et al.,
Appellees.

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On Appeal from the United States
District Court for the
District of Wyoming

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## BRIEF OF
## UNITED STATES REPRESENTATIVE
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IN THE

Supreme Court of the United States

October Term, 1982

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No. 82-1066

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UNITED STATES OF AMERICA
Appellant,

v.

HARRY PTASYNSKI, et al.,
Appellees.

---

On Appeal from the United States
District Court for the
District of Wyoming

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BRIEF OF
UNITED STATES REPRESENTATIVE
SILVIO O. CONTE
AMICUS CURIAE

---

A brief in support of appellant is submitted with the written consent of counsel to all parties filed with the Clerk of the Court.

## INTEREST OF THE AMICUS CURIAE

Amicus, Congressman Silvio O. Conte, a Member of Congress in 1980 when the Windfall Profit Tax Act (Pub. L. No. 96-223, §§101-103, 94 Stat. 229-256 (1980)) was adopted, was a proponent of that measure during consideration by the House of Representatives (125 Cong. Rec. H5314 (daily ed. June 28, 1979); 126 Cong. Rec. H1070 (daily ed. Feb. 20, 1980)). Accordingly, Congressman Conte has an interest in insuring that the views and intent of those who supported this measure are thoroughly presented in litigation involving the constitutionality of the Windfall Profit Tax Act. Congressman Conte is also a Member of the present (98th) Congress, and serves as ranking minority member of the House Committee on Appropriations. If the decision of the

constituents represented by Congressman Conte. This brief is in support of the government's position on severability and does not address the issue of uniformity.

## SUMMARY OF ARGUMENT

The applicable severability provisions of the Internal Revenue Code of 1954, traditional judicial deference to the judgment of legislative bodies in enacting revenue measures, and legislative intent as embodied in the legislative history of the Windfall Profit Tax Act, all support the conclusion that even if the Windfall Profit Tax Act does violate the uniformity clause of the United States Constitution, Article I, §8, cl. 1, the remainder of the Act should be severed and upheld. Appellees' reliance on the statements of opponents of the Act as a basis

United States District Court for the District of Wyoming, which would require the repayment by the government of some $78 billion plus interest in windfall profit tax revenues, is affirmed, Congress will have to resolve a number of serious financial problems. These would include providing for the repayment of the already collected windfall profit taxes and dealing with the resulting shortfall in federal revenue resources. Congressman Conte will be involved in attempting to solve the resultant financial chaos, both as a Member of Congress and as ranking minority member of the House Appropriations Committee.

Finally, affirmance of the lower court's opinion would necessitate taxing and/or spending decisions that would adversely affect the Western Massachusetts

for concluding that Congress intended that the Act in its entirety fail should a single provision of that Act be held unconstitutional is misplaced.

Failure to reverse the decision of the lower court concerning separability would result in governmental finanial chaos. Billions of dollars in collected revenues would have to be repaid and potential future revenues lost. Such a decision would require significant and immediate legislative corrective action, and would represent an unwarranted judicial intrusion into the legislative process. For these reasons the decision of the lower court on the issue of severability must be reversed.

## ARGUMENT

### I. STATUTORY AUTHORITY, JUDICIAL PRECEDENT, AND AUTHORITATIVE LEGISLATIVE HISTORY SUPPORT SEPARABILITY.

#### A. Statutory Authority Supports Separability

Section 7582(a) of the Internal Revenue Code of 1954 (26 U.S.C. § 7582) provides that "[i]f any provision of this title, or the application thereof to any person or circumstances, is held invalid, the remainder of the title, and the application of such provision to other persons or circumstances, shall not be affected thereby." Appellee State of Louisiana asserts that this separability provision should be read to preserve only the preexisting provisions of the Internal Revenue Code, and is inapplicable to the separability of any single amendatory enactment, including the Windfall Profit Tax

Act (Motion to Affirm 15-16). The State of Louisiana would require that apparently all parts of such an Act, regardless of their diversity and their capability of severance, are to be viewed as a single provision and inseparable for constitutional purposes. The State of Louisiana cites no authority for this unique proposition. Subsequent legislative enactments do become a part of "this title" to which the provision applies. Nothing in Section 7582(a) suggests that the severable parts of an amending act are to be treated in a different manner than the severable parts of the original enactment. In fact, given the apparent randomness with which various provisions may be included by the Congress in one tax law or another, such an approach would be extremely unworkable. Indeed, Congress made

it clear that it intended even a single provision to survive where it could be constitutionally applied to some persons or circumstances but not to others. Section 7582(a) clearly applies to the separable provisions of the Windfall Profit Tax Act.

B. Judicial Precedent Supports Severability

Even in the absence of a separability provision this court has found that "[t]he cardinal principle of statutory construction is to save not to destroy." Tilton v. Richardson, 403 U.S. 672, 684 (1971) (plurality opinion), quoting N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937). As this Court has recognized, saving rather than destroying is of particular importance when the severance of provisions in a revenue measure is

involved. Utah Power & Light Co. v. Pfost, 286 U.S. 165, 183-186 (1932); Field v. Clark, 143 U.S. 649, 696-697 (1892). The Windfall Profit Tax Act, which has raised billions of dollars in revenues, is clearly a revenue measure, as the District Court recognized in its opinion holding the entire tax invalid and inseparable. Ptasynski v. United States, 550 F. Supp. 549, 555 (D. Wyo. 1982).

As a revenue measure to which a severability provision applies, the severable provisions of that Act are entitled to a strong presumption of separability.

### C. The Legislative History of the Windfall Profit Tax Act Supports Severability

The proposition that the revenue generating provisions of the Windfall Profit Tax Act are entitled to a presumption of

severability in this case is supported by the legislative history of the enactment. Questions as to the constitutionality of the tax were first raised during Senate consideration of the Conference Report. In response, the Chairman of the Senate Finance Committee, a conferee and the floor manager of the bill, Senator Long, asked for and received an opinion from the Office of Legislative Counsel on the question of severability (126 Cong. Rec. S2771, S2773-2774 (daily ed. Mar. 20, 1980); S2825-2828 (daily ed. Mar. 21, 1980)). That opinion concluded that the severability provision in Section 7582(a) of the Internal Revenue Code applied to the separable provisions of the Windfall Profit Tax Act. Thus, a presumption of divisibility existed. The other provisions were considered to be severable,

because the Alaskan exemption was at best a secondary legislative concern. The remaining provisions capable of enforcement should therefore remain intact even if the Alaskan exemption clause is held invalid. Legislative Counsel expressed the view that even absent a statement of specific Congressional intent, it was improbable that the judiciary would not sever the remaining provisions if the so-called Alaskan exemption were found invalid. The memorandum suggested that "[i]t would be desirable to have <u>the record of the debates on the conference report</u> ... reflect explicitly an understanding that the Congress does not intend for the validity of the windfall profit tax as a whole to depend upon the validity of the Alaskan oil exemption." (emphasis added)

126 Cong. Rec. S3056-S3057 (daily ed. Mar. 26, 1980). This was done by the floor manager in a statement which included the opinion. 126 Cong. Rec. S3055-S3057 (daily ed. Mar. 26, 1980).

Appellees urge that the statement of Senator Long should be treated as the expression of an individual Member entitled to little weight. Motion of the State of Louisiana to Affirm 18-19, Motion of the State of Texas to affirm 9; and Motion of Taxpayer and Association to Affirm 27.

However, judicial decisions have repeatedly given the views of committee chairmen, committee members, floor managers and conferees considerable weight in determining legislative intent. See, e.g., Train v. Colorado Public Interest Research Group, 426 U.S. 1, 11-23 (1976);

Bindczyck v. Finucane 342 U.S. 76, 83 (1951); Chicago, Milwaukee, St. P. & Pac. R.R. Co. v. Acme Fast Freight, 336 U.S. 465, 473-476 (1949); Duplex Printing Press Co. v. Deering, 254 U.S. 443, 474-477 (1921); see generally, 2A Sutherland Statutory Construction, §48.14 (4th ed. C. Sands 1973).

In the Chicago, Milwaukee, St. P. and Pac. R.R. Co. v. Acme Fast Freight, the Court gave greater weight to the unchallenged statement of the ranking minority member of the committee reporting the bill, a conferee who supported the measure, than to a contrary statement in the committee report. 336 U.S. at 473-476. In Duplex Printing Press Co. v. Deering the Court's opinion treated the House floor manager's statement as a supplement to the

committee report in expressing legislative intent, saying:

> By repeated decisions of this court it has come to be well established that the debates in Congress expressive of the views and motives of individual members are not a safe guide, and hence may not be resorted to, in ascertaining the meaning and purpose of the lawmaking body. Aldridge v. Williams, 3 How. 9, 24; United States v. Union Pacific R.R. Co., 91 U.S. 72, 79; Binns v. United States, supra; Pennsylvania R.R. Co. v. International Coal Co., 230 U.S. 184, 198-199; United States v. Coca Cola Co., 241 U.S. 265, 281; United States v. St. Paul, Co., 247 U.S. 310, 318. (254 U.S. at 474-475). (emphasis added)

A similar view is expressed in 2A Sutherland Statutory Construction §48.14:

> When a bill is reported out of a standing committee, the member of the committee in charge of the bill, normally the chairman, explains its meaning to the house and in the ensuing debate answers questions as to the meaning of particular sections or phrases. As the committeeman in charge

> has the duty of defending the bill, he has familiarized himself with the situation sought to be remedied by the bill and his statements may be taken as the opinion of the committee as to what is meant by the bill.

In his statement Senator Long clearly indicated that he is speaking as floor manager and conferee in using such phrases as "intent of Congress", "our intent", and "our thought". 126 Cong. Rec. S3056 (daily ed. Mar. 26, 1980). Nowhere in the statement is there any indication that he had set aside his role as spokesman for the committee and conference to state his views as an individual member. Senator Long's remarks on severability clearly represented his position for the record of the statement of specific intent on the Alaskan severability issue, as recommended by the Office of Legislative Counsel and in the manner recommended by that

Office. Further, Senator Long's statement was unchallenged.

The argument that encouraging domestic production was one of the goals of Congress in enacting the statute in question and that the Alaskan oil exemption was designed to encourage domestic production (Motion of the State of Louisiana to Affirm 18; Motion of State of Texas to Affirm 10-11; Motion of Taxpayer and Association to Affirm 23-24) contains no evidence of a specific legislative intent that the entire tax survive or fall with the constitutionality of the Alaskan exemption. That exemption was one of several incentives for domestic production. Others included special windfall tax treatment for tertiary oil, newly discovered oil, heavy oil, and independent producers. 26 U.S.C. §4987-4994. If the Alaskan

exemption were severed, these incentives would remain and, as Senator Long noted in his statement, oil in the exempt areas of Alaska would be treated as new oil and taxed at a lower rate, certainly an inducement to production although not as great an inducement as a total exemption from taxation. 126 Cong. Rec. S3056 (daily ed. Mar. 26, 1980). Appellees cannot overcome the specific and authoritative statements of the floor manager by a recitation of generalizations of the type that might be made about any provision in any legislation during the course of its consideration by Congress. Legislative provisions are discussed and reasons given for their inclusion as a general practice, but it would be entirely inappropriate to rely on such generalities, when contradicted by a specific,

authoritative, and unchallenged statement by the measure's floor manager clearly supporting a conclusion of severability.

Considerable attention is giver by appellees to the statements of Senator Stevens of Alaska, an opponent of the Windfall Profit Tax Act. Motion of Taxpayer and Association to Affirm 26-27; Motion of the State of Texas to Affirm 9-10. Generally, the views of opponents of a measure are given little probative effect as opposed to the stated views or the silence of supporters of a measure. National Woodwork Mfrs. Ass'n. v. N.L.R.B., 386 U.S. 612, 639-640 (1967); N.L.R.B. v. Fruit & Vegetable Packers, 377 U.S. 58, 66 (1964); Mastro Plastics Corp. v. N.L.R.B., 350 U.S. 270, 288 (1956); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384,

394-395 (1951). Reliance on the statements of Senator Stevens and other opponents of the measure would not be justified even in the absence of a definitive statement by the bill's floor manager.

## II. FAILURE TO SEVER WOULD CREATE FINANCIAL CHAOS AND CONSTITUTE JUDICIAL LEGISLATION

Appellees have urged that the judiciary would be making legislative policy decisions should it hold that the remaining provisions of the Windfall Profit Tax Act are severable from the Alaskan oil exemption. Motion of the State of Louisiana to Affirm 20-22; Motion of the State of Texas to Affirm 11-12. In fact, as decisions of this Court clearly suggest, the reverse is true when revenue measures are involved. "Unless it be impossible to avoid it, a general revenue statute should never be declared inoperative in all its

parts because a particular part relating to a distinct subject may be invalid. A different rule might be disastrous to the financial operations of the government, and produce the utmost confusion in the business of the entire country." Field v. Clark, 143 U.S. at 696-697. Failure to sever the revenue provisions in this case would require repayment of many billions of dollars in collected taxes and require the government to forego the potential availability of additional revenues. Congress would be faced with the need to borrow additional funds in the face of a deficit that already threatens to approach $200 billion in fiscal 1983, reduce appropriations to many programs in order to make up the shortfall or find additional revenue sources. It would be a disaster to the financial operations of the

government. "We find no warrant for concluding that the legislature would have been content to sacrifice an important revenue statute in the event that relief from its burdens in respect of particular individuals should become ineffective." Utah Power & Light Co. v. Pfost, 286 U.S. at 185.

Acceptance of the arguments and evidence of legislative intent urged by appellees would have a potentially disastrous effect on the legislative process. Such acceptance would give substantial credence to general and common reasons for the inclusion of particular legislative provisions, and to statements and actions of the opponents of measures in determining such intent. Proponents might be discouraged from giving any reasons in support of particular provisions and

opponents encouraged to say anything and everything in opposition to the bill in anticipation of a possible constitutional or other legal challenge.

## CONCLUSION

The judgment of the United States District Court for the District of Wyoming on the issue of severability should be reversed.

Respectfully submitted,
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No. 82-1066

# In the Supreme Court of the United States

**October Term, 1982**

UNITED STATES OF AMERICA,
*Appellant,*

VS.

HARRY PTASYNSKI, ET AL.,
*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

**BRIEF OF AMICI CURIAE, GULF & GREAT PLAINS LEGAL FOUNDATION OF AMERICA, NATIONAL ASSOCIATION OF ROYALTY OWNERS, GUS O. HOLLIS, MAXINE HOLLIS, AND JEAN WALSH QUINNETT, IN SUPPORT OF APPELLEES**

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# In the Supreme Court of the United States

**October Term, 1982**

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UNITED STATES OF AMERICA,
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vs.

HARRY PTASYNSKI, ET AL.,
*Appellees.*

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On Appeal From the United States District Court
For the District of Wyoming

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**BRIEF OF AMICI CURIAE, GULF & GREAT PLAINS LEGAL FOUNDATION OF AMERICA, NATIONAL ASSOCIATION OF ROYALTY OWNERS, GUS O. HOLLIS, MAXINE HOLLIS, AND JEAN WALSH QUINNETT, IN SUPPORT OF APPELLEES**

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## INTEREST OF AMICI CURIAE

Gulf & Great Plains Legal Foundation of America is a not-for-profit public interest legal foundation incorporated in Missouri in 1976. It principally serves the people of a nine-state region including Texas, Louisiana, Oklahoma, Arkansas, Kansas, Missouri, Nebraska, and North and South Dakota. The Foundation, among other goals, supports the principles of free enterprise, limited government, and individual liberties. The activities of the Foundation

include original litigation as well as the filing of amicus briefs, of which several have previously been submitted to this Court.

The National Association of Royalty Owners ("NARO") is a voluntary association of owners of royalty interests in oil and gas production. NARO is headquartered in Ada, Oklahoma. NARO's members include many residents of Texas, Oklahoma, and Louisiana, which are three of the states most strongly affected by the lack of geographic uniformity in the Crude Oil Windfall Profit Tax Act of 1980.

Gus O. Hollis, Maxine Hollis, and Jean Walsh Quinnett are holders of small interests in oil and gas production which are subject to the Crude Oil Windfall Profit Tax Act of 1980.* All of these interests are taxed in the seventy percent bracket under the Act. Each of these individual amici has applied for a refund of amounts paid by them under the Act for 1980, the year for which refunds were requested by the taxpayer appellees in the case at bar.

NARO, Gus O. Hollis, Maxine Hollis, and Jean Walsh Quinnett are all of the named plaintiffs in a suit now pending in the United States Court of Appeals for the Tenth Circuit. That suit (*Hollis v. United States*, No. 82-1780) is similar to the case at bar in that it is a suit by taxpayers to have the Crude Oil Windfall Profit Tax Act of 1980 declared unconstitutional. In order to protect their interests in that litigation, as well as to assert their interests as taxpayers affected by the challenged statute, NARO, Gus O. Hollis, Maxine Hollis, and Jean Walsh

---

*Counsel are informed that on March 31, 1983, Gus O. Hollis died as the result of an accident. It is expected that his estate will be substituted as a plaintiff in *Hollis v. United States*, and we would respectfully request that this Court continue to consider his or his estate's interest as an amicus in this case.

Quinnett appear as amici in this case. Attorneys for Gulf & Great Plains Legal Foundation of America are the counsel for NARO, Gus O. Hollis, Maxine Hollis, and Jean Walsh Quinnett in *Hollis v. United States*. In that suit, and in the case at bar, Gulf & Great Plains Legal Foundation of America is representing such persons without charge.**

Written consents to the filing of this amicus brief have been obtained from the Acting Solicitor General and all other parties to this appeal, and are being filed herewith.

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**The Legal Foundation of America has previously filed a brief in this case on behalf of itself as amicus curiae, as well as on behalf of NARO, Gus O. Hollis, Maxine Hollis, and Jean Walsh Quinnett as additional amici. In conjunction with the filing of the present brief, Gulf & Great Plains Legal Foundation of America is entering an appearance as substituted counsel on behalf of amici NARO, Gus O. Hollis, Maxine Hollis, and Jean Walsh Quinnett. Counsel previously appearing for NARO, Gus O. Hollis, Maxine Hollis, and Jean Walsh Quinnett has authorized the Gulf & Great Plains Legal Foundation of America to state that he consents to this substitution, and that the Legal Foundation of America continues to appear as an amicus in this case on its own behalf. NARO, Gus O. Hollis, Maxine Hollis, and Jean Walsh Quinnett adopt the positions taken in the Legal Foundation of America brief, but are now represented by Gulf & Great Plains Legal Foundation of America.

## SUMMARY OF ARGUMENT

Amici contend that the Crude Oil Windfall Profit Tax Act of 1980 is unconstitutional under the Uniformity Clause of the United States Constitution, since on its face the Act exempts certain crude oil production from an excise tax based upon the geographic location of that production. The briefs of the Appellees and Appellee-Intervenors thoroughly address the history of the Uniformity Clause, the policies behind its adoption by the Constitutional Convention, and its interpretation by this Court. Amici concur in such arguments, and will not repeat them here. The requirement of the Uniformity Clause that any excise tax be "uniform throughout the United States" is explicit and direct, and this Court has consistently construed that Clause to require geographic uniformity. The policies or justifications alleged to support a geographically non-uniform enactment are irrelevant. An Act of Congress, to be constitutional, can no more contravene the specific command of the Uniformity Clause than it can any of the other direct and explicit limitations on congressional power contained in Article I.

The primary arguments advanced by amici concern the severability of the exemption of Alaskan oil from the remainder of the Crude Oil Windfall Profit Tax Act. The District Court held that the Alaskan exemption could not be severed, based upon its findings of congressional intent. But the District Court further found that invalidation of the Alaskan exemption would necessarily result in extension of the tax to all crude oil production in Alaska, which extension would amount to impermissible judicial legislation. In this brief, amici will develop that argument more thoroughly. The "judicial legislation" of a tax, which would result from severing the Alaskan exemption, is not

within the power of this or any Court, since the imposition of a tax by the judiciary would violate the principle of separation of powers, and constitute an assumption of an enumerated legislative power which has been reserved by the Constitution to Congress alone. This Court has repeatedly affirmed the principle that the judiciary cannot constitutionally exercise legislative powers, and, in a long line of cases, has held that the judiciary has no power to impose a tax.

In addition, the action requested of this Court by the Government in "severing" the Alaskan exemption would depart from the "case or controversy" presented by the Appellees' claims, and move the Court into an area in which it has no jurisdiction. The question of whether a tax should be imposed is a legislative decision, and is neither the type of dispute "historically viewed as capable of resolution through the judicial process" nor "a real and substantial controversy which unequivocally calls for the adjudication of the rights" asserted. Therefore, any inquiry into whether a tax should be imposed upon exempt Alaskan oil is foreclosed, since that question is not justiciable. The Court only has power to decide whether the Act meets constitutional standards. If it does not, any action of a legislative character to cure the infirmity must remain with Congress.

## ARGUMENT

### I. THE WINDFALL PROFIT TAX ACT, BY REASON OF ITS EXEMPTION OF OIL PRODUCED FROM CERTAIN GEOGRAPHIC REGIONS, VIOLATES THE UNIFORMITY CLAUSE.

The Constitution of the United States provides that:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States * * *. U.S. Const., art. I, §8, cl. 1.

The Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223, 94 Stat. 229, imposes an excise tax which is not uniform throughout the United States, since oil produced in certain geographically defined regions of Alaska is exempt from the tax. 26 U.S.C. §4994(e) (1980).

The decisions of this Court construing the Uniformity Clause have without exception held that the uniformity required thereunder is geographic uniformity. *Fernandez v. Wiener*, 326 U.S. 340 (1945); *Riggs v. Del Drago*, 317 U.S. 95 (1942); *Charles C. Steward Machine Co. v. Davis*, 301 U.S. 548 (1937); *Phillips v. Commissioner of Internal Revenue*, 283 U.S. 589 (1931); *Poe v. Seaborn*, 282 U.S. 101 (1930); *Bromley v. McCaughn*, 280 U.S. 124 (1929); *Florida v. Mellon*, 273 U.S. 12 (1927); *La Belle Iron Works v. United States*, 256 U.S. 377 (1921); *Brushaber v. Union Pacific Railroad Co.*, 240 U.S. 1 (1916); *Billings v. United States*, 232 U.S. 261 (1914); *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911); *Patton v. Brady*, 184 U.S. 608 (1902); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Knowlton v. Moore*, 178 U.S. 41 (1900); *Pollock v. Farmers' Loan &

*Trust Co.*, 157 U.S. 429 (1895); *Head Money Cases*, 112 U.S. 580 (1884); *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796).

The Government argues that whether the tax is geographically uniform is not the test. According to the Government, "the question is whether the classification based on those geographic considerations is justified by the relationship of those considerations to the 'subject' of the regulation or tax." Brief for the United States at 27. The Government devotes over ten pages of its brief to showing that Congress had good grounds for exempting certain Alaskan production from the tax. Brief for the United States at 13-23. In other words, the Government seeks to change the inquiry from whether the tax is uniform to whether Congress was right in making it not uniform.

This they cannot do. There are certain commands and limitations in the Constitution which are so mandatory, clear, and direct in their application that they cannot be disregarded, no matter how good the grounds might seem for doing so in a particular case. Clause 12 of art. I, §8 is an analogous provision, since it also contains a grant of power with a limitation. Congress is given the power "[t]o raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years * * *." May Congress, or this Court, disregard such an express limitation upon a showing that it was expedient, convenient, or even profoundly wise to do so? May a "Tax or Duty * * * be laid on Articles exported from any State" upon a showing that reasonable justifications existed for such a tax? U.S. Const., art. I, §9, cl. 5. May a direct tax be laid, not in proportion to the census, because there might be compelling reasons for doing so? U.S. Const., art. I, §9, cl. 4. May an ex

post facto law be passed, or a title of nobility granted, because considerations of public policy appear to support it? U.S. Const., art. I, §8, cl. 8.

This Court has never permitted such inquiries. Certainly, issues of construction or interpretation of what is meant by the various terms of the Constitution are regularly presented to the Court. But there is no such question of construction here. The Court has made it abundantly clear, over the course of almost two centuries of interpreting the Uniformity Clause, that what is meant is geographic uniformity. Since the Crude Oil Windfall Profit Tax Act on its face treats some geographic areas of the country differently than other geographic areas, that Act is void on its face. As Justice Roberts explained, in a famous passage:

> When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the Government has only one duty—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. *United States v. Butler*, 297 U.S. 1, 62 (1936).

To hold that the challenged Act does not violate the Uniformity Clause would make that Clause a dead letter. The fact that different circumstances might exist in portions of Alaska cannot be a justification, since differences in circumstance will always exist among the several states. If Congress may exempt Alaskan oil while taxing the rest of the country, it can just as certainly tax Wyoming coal while exempting West Virginia coal, or vice versa. "Justifications" could certainly be found to explain the imposition of a lower excise tax on gasoline in New York than in Texas. Costs in transportation alone would certainly

form a "rational basis" for a lower excise tax on tobacco and alcohol in Hawaii than in Kentucky. When the command of the Constitution is clear, neither Congress nor the courts are permitted to disregard it because policy considerations might support a different view. The issue has already been resolved by the people in 1788, and debate on the subject can only be reopened by the people through the amending process.

Though the Government hints that the exemption's non-inclusion of the entire state of Alaska may be of some importance (Brief of the United States at 20-21), it can in fact be of no consequence. If such a view were to be adopted, Congress could exempt from taxes oil produced south of the Mason-Dixon Line, wine produced west of the Continental Divide, or products sold on Manhattan Island. The fact that the exemption was cast in geographic terms of any description is what makes the statute defective.

## II. IF THE WINDFALL PROFIT TAX ACT IS HELD UNCONSTITUTIONAL, THE EXEMPTION FOR ALASKAN OIL CANNOT BE "SEVERED," SINCE UNDER THE SEPARATION OF POWERS DOCTRINE COURTS HAVE NO POWER TO IMPOSE A TAX.

### A. Under the doctrine of separation of powers, the judiciary has no power to "sever" a portion of an unconstitutional statute, if doing so would require the courts to exercise a legislative power expressly confided to the Congress.

The District Court found that the entire Act must fall because the exception for "exempt Alaskan oil" could not be severed. *Ptasynski v. United States*, 550 F.Supp.

549, 555 (D.Wyo. 1982). The lower Court relied principally upon the legislative intent in so ruling. *Id.* at 554-55. The Appellees and Appellee-Intervenors in their briefs have also furnished an extensive analysis of the legislative history, and the rules of construction to be applied thereto, which fully supports the District Court's conclusion.

However, the District Court found a further basis which required the entire Act to be invalidated; namely, the fact that "severance" of the Alaskan exemption would amount to judicial imposition of a tax. As the Court stated:

> Were the Alaskan exemption simply invalidated, and the balance of the Act left independently enforceable, the result would be extension of the tax to all crude oil production in Alaska, subject of course to the categorization of the various tiers. Action of that nature amounts to judicial legislation which is not permissible and should be avoided by courts. Under the "guise of interpretation" courts cannot alter legislative intent or usurp legislative authority, 73 Am. Jur.2d *Statutes*, §197, p. 394 (1974) and cases cited therein; Sutherland, *supra* at §44.13, p. 359, and this Court will not infringe upon the powers and duties of Congress. Accordingly, due to the unconstitutionality of the Alaska exemption, the Act in its entirety must fall. *Id.* at 555.

Imposition of a tax by a court is more than something that "should be avoided." The roots of any court's disability to impose a tax go deeper than that, extending down to the most fundamental principles upon which our Constitution and theory of government are based. The question of congressional intent is of limited value under the facts of this case. Whether Congress *would have* taxed the exempt Alaskan oil had it known for certain that such

exemption would violate the Uniformity Clause is not dispositive. The fact remains that under our system of government *only* Congress can do so. The most iron-clad evidence of congressional intent to "sever" the exemption, and to tax Alaskan oil, would not justify this Court in doing so, since the *power* to do so is reserved exclusively to Congress. The power of taxation is quintessentially a legislative power, and cannot be exercised by the judiciary.

The most famous exposition of the doctrine of separation of powers is that of Montesquieu. In counseling that true liberty depends upon a separation of the legislative, judicial, and executive powers, Montesquieu specifically noted that a separation of legislative and judicial powers is essential:

> Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then legislator. Montesquieu, *The Spirit of the Laws,* Book 11, §6, at 152 (T. Nugent trans. 1949).

By the time of *The Federalist,* Montesquieu's principles of separation of powers had such a deep hold on political thought that Madison was able to refer to him as "the celebrated Montesquieu" and state that he is the "oracle who is always consulted and cited on this subject." *The Federalist* No. 47, at 330 (J. Madison) (M. Dunne ed. 1901). Madison quoted the above passage from Montesquieu, *id.* at 332, and agreed that:

> The judges can exercise no executive prerogative, though they are shoots from the executive stock; nor any legislative function, though they may be advised with by the legislative councils. *Id.* at 331.

This Court has had many occasions to stress the fundamental importance of the separation of powers:

> The doctrine of separation of powers is fundamental in our system. It arises, however, not from Art. III nor any other single provision of the Constitution, but because "behind the words of the constitutional provisions are postulates which limit and control." *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 591 (1949) (quoting Hughes, C. J., in *Monaco v. Mississippi*, 292 U.S. 313, 323 (1934)).

The purpose of the separation of powers has been described as follows:

> The Constitution, in distributing the powers of government, creates three distinct and separate departments—the legislative, the executive, and the judicial. This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital, namely, to preclude a commingling of these essentially different powers of government in the same hands. *O'Donoghue v. United States*, 289 U.S. 516 (1933).

Even small departures from this separation are problematic:

> One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule. *Sinking Fund Cases*, 99 U.S. 700, 718 (1879).

Equally basic, and allied to the doctrine of separation of powers, is the principle that the federal government is a government of enumerated powers. As Chief Justice Marshall said in an historic case:

> The government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it * * * is now universally admitted. *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 405 (1819).

Though the enumerated powers have been greatly expanded in recent years, the principle remains a bedrock of our system. It cannot be denied that, as a general rule, powers which are specifically enumerated in the Constitution as belonging to one branch of government cannot be exercised by another branch, unless there has been an express delegation of that power under appropriate limitations and safeguards. As will be shown below, the power to impose a tax is one of the most basic of legislative functions, and has always been so considered by this Court. For a court to impose a tax on persons whom Congress has never taxed on that subject would violate the most essential principles of the separation of powers.

**B. The power to lay a tax is a legislative power, which the Constitution entrusts solely to Congress, and the judiciary therefore cannot impose a tax in this case without violating the separation of powers.**

The Constitution, in enumerating the "legislative Powers herein granted" specifically states that "Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises * * *." U.S. Const., art. I, §1; *id.* at §8, cl. 1. Furthermore, any legislation to raise revenue must originate in the House of Representatives. U.S. Const., art. I, §7, cl. 1.

This Court has recently declared that "[t]axation is a legislative function" and that Congress "is the sole organ for levying taxes * * *." *National Cable Television Ass'n,*

*Inc. v. United States,* 415 U.S. 336, 340 (1974) (citing art. I, §8, cl. 1). At issue in that case was the validity of certain assessments which might be made by the FCC on community antenna television systems. The Court held that certain elements of cost could not be considered in computing such assessments, lest the assessments imposed become a "tax" instead of a "fee." The Court condemned as a "sharp break with our traditions" any inference that "Congress had bestowed on a federal agency the taxing power." *Id.* at 341. If the Congressional grant of power to the FCC were construed in its broadest sense, the Court concluded that it would carry the agency "far from its customary orbit and [put] it in search of revenue in the manner of an Appropriations Committee of the House." *Id.* The opinion quoted with approval the remarks of Mr. Chief Justice Hughes that "The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested." *Schechter Corp. v. United States,* 295 U.S. 495, 529 (1935).

If the executive branch, under an express grant of congressional authority, is not permitted to impose revenue raising measures because such measures by their breadth might turn into a tax, surely the judiciary is prohibited from imposing taxes when there has been no delegation from Congress at all. In a long line of cases, this Court has affirmed that very principle.

The leading case holding that the judiciary lacks the *power* to impose a tax is *Rees v. City of Watertown,* 86 U.S. (19 Wall.) 107 (1874). In that case, a judgment creditor of a city sought to have the federal judiciary order that a tax be imposed upon the municipality in order to pay certain municipal bonds. Actions in mandamus had failed to produce any result, since the appropriate municipal officers kept resigning from office to avoid levying

the tax. This Court, while recognizing the validity of the debt, stated that there was a "grave question of the *power* of the court to grant the relief asked for." *Id.* at 116. [emphasis added] The Court continued:

> We are of the opinion that *this court has not the power to direct a tax to be levied* for the payment of these judgments. This power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised * * * by the power of legislative authority only. *It is a power that has not been extended to the judiciary.* Especially is it beyond the power of the federal judiciary to assume the place of a state in the exercise of this authority at once so delicate and so important. *Id.* at 116-17. [emphasis added]

The Court did not say that it declined to substitute its judgment for the legislative authorities, or that the actions of the legislative authorities were wise or unwise, proper or improper, legal or illegal. The discussion is phrased entirely in terms of the Court's *power,* and the inability of a court to exercise the legislative power to tax. Imposition of a tax by a court is simply outside its arsenal of available remedies.

The *Rees* case has been repeatedly reaffirmed by this Court. For example, in *Faitoute Iron & Steel Co. v. City of Asbury Park,* 316 U.S. 502 (1942), Mr. Justice Frankfurter noted that the taxing power can only be carried out through "authorized officials." *Id.* at 511 (citing *Rees*). He stated that the only remedy for unsecured creditors of a city "is a mandamus to compel the levying of *authorized* taxes." *Id.* at 510. [emphasis added]

In *Yost v. Dallas County,* 236 U.S. 50 (1915), Mr. Justice Holmes also cited *Rees* with approval. In that case, a frustrated creditor of a local government had been un-

successful in mandamus actions. Justice Holmes opined that by bringing suit in the United States Court the plaintiffs "acquired no greater rights than were given to him by the local statutes." *Id.* at 56. Noting that the tax depended on the sovereignty of the state, Justice Holmes reaffirmed that the taxes could only be levied in the manner provided by the *statute,* and that the courts could not fashion any additional relief. *Id.* at 56-57. The fact that the tax would fall "upon people who are not parties to * * * the suit" was said to be "an additional consideration in favor of the result * * *." *Id.* at 57.

In *Heine v. Levee Commissioners,* 86 U.S. (19 Wall.) 655 (1874), similar principles were applied. Again, the Court was asked to assess taxes when a local board had failed to do so. The Court declined to do so on grounds that it lacked the *power* to impose a tax:

> The power we are here asked to exercise is the very delicate one of taxation. This power belongs in this country to the legislative sovereignty, state or national. In the case before us, the national sovereignty has nothing to do with it. The power must be derived from the Legislature of the State. So far as the present case is concerned, the State has delegated the power to the Levee Commissioners. If that body has ceased to exist, the remedy is in the Legislature either to assess the tax by special statute or to vest the power in some other tribunal. It certainly is not vested, as in the exercise of an original jurisdiction, in any Federal Court. It is unreasonable to suppose that the Legislature would ever select a Federal Court for that purpose. It is not only not one of the inherent powers of the court to levy and collect taxes, but it is an invasion by the judiciary of the Federal Government of the legislative functions of the state

> government. It is a most extraordinary request, and a compliance with it would involve consequences no less out of the way of judicial procedure, the end of which no wisdom can foresee. *Id.* at 660-61.

The Court expressly relied upon the *Rees* case in reaching this result. *Id.* at 661. *See also South Dakota v. North Carolina,* 192 U.S. 286 (1904) ("A levy of taxes is not within the scope of the judicial power except as it commands an inferior municipality to execute the power granted by the Legislature"; citing *Rees* and other cases); *Thompson v. Allen County,* 115 U.S. 550 (1885) (summarizing cases); *Meriwether v. Garrett,* 102 U.S. 472, 501 (1880) ("The power of taxation is legislative, and cannot be exercised otherwise than under the authority of the Legislature.").

The nature of the Supreme Court's judicial review of statutes for constitutionality, and the relation of that power to the separation of powers, was well explained in *Massachusetts v. Mellon,* 262 U.S. 447 (1923). This Court there stated that:

> The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary, the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other, and neither may control, direct, or restrain the actions of the other. * * * We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. * * * [The Court's power] amounts to little more than the *negative power to disregard an unconstitutional enactment* * * *. *Id.* at 488. [emphasis added]

That this Court has the power, and indeed the duty, to disregard the Windfall Profit Tax Act if it violates the Uniformity Clause cannot be doubted. But, as *Massachusetts v. Mellon* makes clear, there is no warrant for going beyond that duty to exercise a legislative power in order to save the statute.

An analogous case was presented in *Aptheker v. Secretary of State*, 378 U.S. 500 (1964). There a statute was held unconstitutional on its face, and the Government urged that it should nevertheless be held constitutional as applied to the particular appellants. *Id.* at 515. The Court stated:

> It must be remembered that '[a]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute * * *' or judicially rewriting it. * * * To put the matter another way, this Court will not consider the abstract question of whether Congress might have enacted a valid statute but instead must ask whether the statute that Congress did enact will permissibly bear a construction rendering it free from constitutional defects.

*See also United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971) ("It is for Congress, not this Court, to rewrite the statute * * *."); *Federal Trade Commission v. Mandel Brothers, Inc.*, 359 U.S. 385, 390 (1959) (refashioning statute "more consonant with the task of a Congressional committee than with judicial construction"); *Stanard v. Olesen*, 74 S.Ct. 768, 771 (1954) ("[I]t is for Congress, not the courts, to write the law."); *Electric Storage Battery Co. v. Shimadzu*, 307 U.S. 5, 14 (1939) (Court cannot "rewrite the statute.").

Clearly, the Windfall Profit Tax Act will not bear a construction which would make it constitutional, since the

geographic limitations contained therein make it void on its face. When this Court will not, as a matter of general policy, "rewrite" statutes to make them constitutional, any ability to do so must be totally lacking when such an action would result in the imposition of a tax, and the Constitution confides that power exclusively to Congress.

The case against judicial exercise of a legislative power is especially strong when Congress has clearly and deliberately omitted the provision which the Court is invited to supply. As stated in *Northwest Airlines v. Transport Workers Union of America,* 451 U.S. 77, 97 (1981):

> In almost any statutory scheme, there may be a need for judicial interpretation of ambiguous or incomplete provisions. But the authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt.

*See also United States v. Cooper Corp.,* 312 U.S. 600, 605 (1941) ("[I]t is not our function to engraft on a statute additions which we think the legislature logically might or should have made."); *Ebert v. Postman,* 266 U.S. 547, 554 (1925) ("A casus omissus does not justify judicial legislation."); *Federal Trade Commission v. Simplicity Pattern Co., Inc.,* 360 U.S. 55, 67 (1959) ("We cannot supply what Congress has studiously omitted."); *Iselin v. United States,* 270 U.S. 245, 251 (1926) ("To supply omissions transcends the judicial function."); *Southern S. S. Co. v. National Labor Relations Board,* 316 U.S. 31, 44 (1942) ("When the legislative purpose is so plain, we cannot assume to do that which Congress has refused to do.").

This Court has refused to sever portions of a tax statute when to do so would involve the exercise of a legislative function. In *Marchetti v. United States,* 390 U.S. 39 (1968), the Court refused to impose restrictions upon a tax statute

which, according to the Government, would have saved it from a finding of unconstitutionality. It emphasized the fact that the Constitution has placed such legislative powers in the Congress, and that those powers cannot be exercised by the Court. *Id.* at 60. The opinion also concluded that the offending section could not be severed because the result would be to rewrite the statute. The Court stated that "this would, to some extent, substitute the judicial for the legislative department of government * * *. To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty." *Id.* n. 18. *See also Haynes v. United States,* 390 U.S. 85, 99-100 (1968); *Oklahoma Tax Commission v. Texas Co.,* 336 U.S. 342, 365-66 (1949) (question of whether immunity from taxes shall be extended is essentially legislative in character).

The Court has expressly found itself to be without "authority" or "competence" to extend a tax beyond that which was passed by the legislature, even when the failure to do so would result in unconstitutionality. *Davis v. Wallace,* 257 U.S. 478 (1922). In that case this Court said:

> Here the excepting provision was in the statute when it was enacted, and there can be no doubt that the Legislature intended that the meaning of the other provisions should be taken as restricted accordingly. Only with that restricted meaning did they receive the legislative sanction which was essential to make them part of the statute law of the state, and no other authority is competent to give them a larger application * * *. [T]o sustain the tax in question we should have to hold that the taxing officers, on finding that it could not constitutionally be assessed on the basis specially prescribed in the statute, were at liberty to assess it on another and different basis * * *. Of course, we cannot so hold. *Id.* at 484-85.

**C. This Court does not have jurisdiction to impose a tax on exempt Alaskan oil not passed by Congress, since a decision to impose a tax is not a "case or controversy" within the constitutional meaning of those terms.**

It is elementary that a question is not justiciable by this Court if it does not present a "case or controversy" within the meaning of U.S. Const., art. III. This Court has recently stated that:

> The purpose of the case-or-controversy requirement is to "limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." *Flast v. Cohen,* 392 U.S. 83, 95 (1968). The clash of adverse parties "sharpens the presentation of issues upon which the court so largely depends for illumination of difficult * * * questions." [citations omitted] *GTE Sylvania, Inc. v. Consumers Union,* 445 U.S. 375, 382-83 (1980).

Under the peculiar facts of this case, the existence of a "case or controversy" is inextricably linked with the question of whether a legislative function is being performed. There can be no doubt that a justiciable controversy is presented with respect to whether the Windfall Profit Tax Act violates the Uniformity Clause, since all that is involved in such a determination is the familiar question of measuring an Act of Congress against recognized constitutional standards. However, to "sever" the Alaskan oil exemption, as the Government requests, would necessarily involve imposition of a tax which Congress has not legislated. Any such action would radically depart from those types of questions "historically viewed as capable of resolution through the judicial process." No legal issues are presented in making such a determination; it is a pure policy decision.

The issue of whether a tax should be imposed does not "present a real and substantial controversy which unequivocally calls for adjudication of the rights" asserted. *Poe v. Ullman*, 367 U.S. 497, 509 (1961) (Brennan, J., concurring). Similarly, "the appropriateness of the issues" for judicial decision has been held to be an important factor in determining justiciability, and the imposition of a tax fails that test as well. *Id.* at 509 (Frankfurter, J., plurality opinion). It is difficult to imagine an issue which is less appropriate for judicial decision than the issue as to whether a tax should be imposed. As this Court has repeatedly stated, the area of tax policy is an "area of limitless factual variations," and it is therefore the province of Congress, and not the courts, to devise appropriate rules. *Bingler v. Johnson*, 394 U.S. 741, 751 (1969); *United States v. Correll*, 389 U.S. 299, 307 (1967).

The inappropriateness of a judicial forum for passing upon questions of tax policy was strikingly described in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981). In that case, this Court considered the validity of a Montana severance tax on coal. Particularly, the tax was claimed to violate various constitutional and federal statutory provisions because of the high rate of tax imposed. The Court declined to embark upon any analysis which would make the rate of taxation a matter of federal constitutional law. After noting that the appropriate level or rate of taxation is essentially a matter for legislative and not judicial resolution, the Court underlined the impossibility of determining questions of tax policy in a judicial forum:

> In the first place, it is doubtful whether any legal test could adequately reflect the numerous and competing economic, geographic, demographic, social, and political considerations that must inform a decision about an acceptable rate or level of state taxa-

> tion, and yet be reasonably capable of application in a wide variety of individual cases. But even apart from the difficulty of the judicial undertaking, the nature of the factfinding and judgment that would be required of the courts merely reinforces the conclusion that questions about the appropriate level of state taxes must be resolved through the political process. *Id.* at 628.

Of course, the decision to impose a tax *a fortiori* involves these considerations to an even greater extent than a decision as to the appropriate rate level. Certainly a tax which will likely involve billions of dollars worth of revenue cannot be imposed as a mere incident of a general severability clause, or as the result of canons of statutory construction. Some department of the government must pass upon the prudence and wisdom of such a tax. Congress has indeed passed upon the wisdom of such a tax on Alaskan oil, and has decided that such a tax should not be imposed. To impose such a tax by "severing" the exemption of Alaskan oil would require this Court either to impose the tax without considering its merits, or to impose it after a reasoned consideration of its merits. Neither is desirable nor permissible, because neither is an exercise of the judicial function of deciding "cases or controversies."

The legislative history of the Windfall Profit Tax Act has been extensively discussed in the briefs filed by the parties in this case. In light of that legislative history, the remarks of this Court in *American Automobile Association v. United States,* 367 U.S. 687 (1961), are entirely appropriate:

> At the very least, this background indicates Congressional recognition of the complications inherent in the problem and its seriousness to the general

> revenue. We must leave to the Congress the fashioning of a rule which, in any event, must have wide ramifications. The Committees of the Congress have standing committees expertly grounded in tax problems, with jurisdiction covering the whole field of taxation and facilities for studying considerations of policy as between the various taxpayers and the necessities of the general revenues. The validity of the long-established policy of the Court in deferring, where possible, to Congressional procedures in the tax field is clearly indicated in this case. *Id.* at 697.

The above comments were made in the context of refusing to interfere with established tax rules. Those considerations are doubly compelling when the proposed action by this Court would be to impose a tax on individuals which Congress has never enacted as to them. As stated in *Marchetti v. United States*, 390 U.S. 39, 59 (1968):

> We cannot know how Congress would assess the competing demands of the federal treasury and of state gambling prohibitions; we are, however, entirely certain that the Constitution has entrusted to Congress, and not to this Court, the task of striking an appropriate balance among such values. *Id.* at 59-60.

In a similar vein, there is no way for this Court to know how Congress would assess "the competing demands" of the federal treasury and of crude oil production.

Because it is essentially legislative in character, and involves the balancing of numerous complex policy and political issues for which the courts are not an appropriate forum, the invitation by the Government to impose a tax by "severing" the Alaskan oil exemption does not present a justiciable "case or controversy" within the meaning of Article III.

## CONCLUSION

Title I of the Windfall Profit Tax Act clearly violates the Uniformity Clause by granting an exemption from an excise tax which is expressly based upon geographic boundaries. The entire Act must be declared unconstitutional. Any attempt to "sever" the exemption for Alaskan oil would necessarily result in the imposition of a tax on such oil. The power to lay and collect taxes is exclusively confided to the Congress under Article I, §8, cl. 8. For this Court to impose such a tax, which has not been passed by Congress or signed by the President, would violate the separation of powers. Furthermore, since the imposition of a tax is essentially legislative in character, the request by the Government for this Court to impose such a tax does not present a case or controversy within the meaning of Article III. For the foregoing reasons, the judgment of the District Court should be in all respects affirmed.

Respectfully submitted,

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NO. 82-1066

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA,
APPELLANT
V.
HARRY PTASYNSKI, ET AL.,
APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

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# BRIEF OF AMICI CURIAE, THE LEGAL FOUNDATION OF AMERICA, NATIONAL ROYALTY OWNERS ASSOCIATION, GUS HOLLIS, MAXINE HOLLIS, AND JEAN WALSH QUINETTE

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# BRIEF OF AMICI CURIAE,
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JEAN WALSH QUINETTE

## INTEREST OF AMICI CURIAE

Gus Hollis, Maxine Hollis and Jean Walsh Quinette are elderly holders of small interests in oil and gas production subject to the Crude Oil Windfall Profit Tax. These individual taxpayer amici have found their retirements jeopardized by the Tax and have filed suit, in an action parallel to the case at bar, to declare the Tax unconstitutional. That suit is styled Hollis v. United States, No. 82-1780, and is now pending in the United States Court of Appeals for the Tenth Circuit. It is to protect their interest in that action that these individual amici appear in this honorable Supreme Court.

The interests of the Hollises are of such size that they seek a refund of $4,437.82 in their suit. Mrs. Quinette seeks a refund of $823.99. The Government has so classified all three taxpayers as to place each in the seventy percent (70%) bracket. The

Hollises reside on and work a family farm in Oklahoma, while Mrs. Quinette is a retired former church worker. None of these amici earns profit that can justly be called a "windfall," nor does any of them fit the sterotype of "big" or "major" producers that were described as the target of the Tax in Congressional debate. Instead, they are typical of the small royalty owners that have borne the heaviest burden of the Tax. That burden is made proportionately greater by the discriminatory nature of the tax, owing to such exemptions as the Alaskan exemption that was the basis of the district court's decision in this case.

These individual amici are members of amicus National Royalty Owner's Association ("NARO"), which is an association of owners of interests in oil and gas production. NARO's members include many persons residing in Texas and Oklahoma, which are the two States most severely affected by the Tax at issue here.

The Legal Foundation of America is a nonprofit corporation supporting the operations of a public interest law firm. Its goals include preservation of the market system, removal of unreasonable regulation, and attainment of a better balance between the federal government and the States. LFA attorneys represent the individual and association amici herein on a pro bono basis.

## STATEMENT OF THE CASE

Amici adopt the Statement of the Case made by appellees, Harry Ptasynski, et al., and by the States of Texas and Louisiana.

## SUMMARY OF ARGUMENT

The Government concedes that the Alaskan exemption is geographically drawn, and it impliedly concedes that a "literal" application of the requirement of geographic uniformity would lead to a holding of unconstitutionality. Nevertheless, the Government seeks to uphold the Alaskan exemption on the ground that it can articulate a "rational basis" for the non-

uniformity, namely, "high production costs" and "transport costs" that it alleges to be unique to Alaska.

This argument should be rejected, first, because the exemption is not part of a uniform national plan taking costs into account. Petroleum is found in all fifty States, and it is produced from many places with high production and transport costs, but Alaska is the only such place afforded exemption. The incidence of the tax is so concentrated that five-sixths of the resulting state tax loss will be suffered by just two States, Texas and Oklahoma, which are average and below average in per capita income, respectively, while Alaska has the highest per capita income of any State in the nation.

Secondly, the "rational basis" test suggested by the Government would destroy the uniformity requirement. If only a rational basis were required to justify geographical variations, the uniformity requirement would add nothing that is not already present in the looser requirement of due process. Given the nature of taxation and the fact that every state is different, almost any discrimination could be so justified. The uniformity requirement is a specific enactment directed at a specific issue, as are the privilege against self-incrimination, the contract clause and the first amendment; at the very least, a compelling governmental interest should be required before it is overcome. The history underlying its adoption refutes the assertion that the mere articulation of some rational basis should suffice.[1]

## ARGUMENT AND AUTHORITIES

### I. THE GOVERNMENT'S ARGUMENT THAT THE ALASKA EXEMPTION, THOUGH GEO-

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1 Amici agree with, and adopt, Appellees' arguments with respect to the non-severability of the exemption. Retroactive impairment would create havoc with respect to massive investment undertaken in reliance on the exemption. Amici have not here repeated these arguments of Appellees but wish to express support for them.

**GRAPHICALLY NOT UNIFORM, IS UNIFORM BECAUSE IT CAN ALLEGEDLY BE "COST JUSTIFIED," IS INAPPOSITE.**

It is established by a mass of cases that the "uniformity" required by the constitution is geographic uniformity.[2] The test for such uniformity is that a "tax is uniform when it operates with the same force and effect in every place where the subject is found."[3]

The government concedes that the Alaska exemption is geographically defined. It further concedes that a literal application of this geographic test supports the lower court's ruling that the tax in this case is unconstitutional. Jurisdictional Statement 14; cf. Brief at 28.

The Government seeks to avoid the effect of the uniformity clause by an argument that rests upon "transportation costs" associated with exempt Alaskan oil. Jurisdictional Statement 11; Brief at 17-18. This "cost justification" argument cannot, however, make the Alaska exemption uniform, because it is simply not part of a uniform national plan taking costs into account.

*A. Assuming that transportation costs are to be taken into account, the "uniformity" provision, at minimum, requires that they be taken into account by a uniform nationwide plan treating all transportation or production costs fairly.*

Even if high production costs may legitimately be taken into account by a taxing scheme, a uniform national plan must

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2 E.g., Head Money Cases, 112 U. S. 580 (1884); Knowlton v. Moore, 178 U. S. 96 (1900); Billings v. United States, 232 U. S. 261 (1914); La Belle Iron Works v. United States, 256 U. S. 377 (1921); Steward Machine Co. v. Davis, 301 U. S. 583 (1934); Fernandez v. Weiner, 326 U. S. 340 (1945).

3 See authorities cited in note 2, supra.

be used. The decision in Standard Oil Co. v. McLaughlin, 67 F.2d 111 (9th Cir. 1933), has certain striking similarities to the present case in that it dealt with a taxing scheme taking transport costs into account. Specifically, Standard Oil Co. v. McLaughlin shows how a national plan can be made uniform with regard to such transport costs. In that case, the Commissioner was empowered to determine a reasonable transportation charge.[4] This charge was in turn used in figuring the tax. The Court said:

> The mere fact that the base on which the 8 per cent tax is computed may vary in different cases, due to different circumstances bearing on the reasonableness of the charge for the transportation of oil and pipelines, does not constitute a lack of uniformity as that term is used in connection with excise taxes. *The amount of the tax in each case will depend upon the amount of oil transported and the reasonable charge therefor* but all those under the same circumstances will pay the same tax.

Id. In the case at bar, there is no such uniformity. The tax does not depend upon "the amount of oil . . . and the reasonable charge" for producing or transporting it, but upon the accident of geography.[5]

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4 McLaughlin is slightly different in that the transport cost was the subject of the excise rather than an alleged basis for exemption. This difference is not material, however, since the requirement of a nationwide plan is the gist of the holding, and that requirement is not met here.

5 Louisiana Public Service Commission v. Texas & N.O.R. Co., 284 U. S. 125 (1931), though cited by the United States here, actually supports appellees, not the United States. In that case, Congress had attempted to create a uniform, nondiscriminatory scheme of rail transport rates throughout the United States. Pursuant to authority given it by Congress, the Interstate Commerce Commission had prescribed interstate and intrastate rates that were nondiscriminatory. The message of the case is simply that the basing of distinctions

That a uniform national plan is required is made clear in the decisions of this court. Knowlton v. Moore, supra, states that uniformity requires that "whatever plan or method Congress adopts for laying the tax in question, the same plan and the same method must be made operative throughout the United States." In the Head Money Cases, the tax in question was imposed upon each passenger brought to the United States from a foreign country; it was held uniform because it operated "precisely alike in every port of the United States where such passengers can be landed." And in Fernandez v. Weiner, supra, the Court upheld a tax laid with respect to all community property interests in all states, stating that it was "applicable throughout the United States wherever such interests may be found." [6]

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upon nondiscriminatory rate computations, set up as part of a uniform national plan, is constitutional.

The Court's specific holding in Louisiana Public Service was that incidental effects upon states or ports from the legitimate exercise of the commerce power was constitutional:

> Congress, acting under the Commerce Clause, causes many things to be done that greatly benefit particular ports and which incidentally result to the disadvantage of other ports in the same or neighboring states. The establishing of ports of entry, erection and operation of lighthouses, improvement of rivers and harbors, and the providing of structures for the convenient and economical handling of traffic, are examples.

Id. at 131.

The present case is clearly different. It does not concern an "incidental" effect produced by unrelated exercise of the commerce power. The discriminatory exemption is apparent from the face of the tax, and it is intentionally and unnecessarily imposed. The plan is not a uniform nationwide one, but an ad hoc regional benefit.

6 In response to this argument, the United States cites bankruptcy and port preference cases. The cases so cited are inapposite and they do not rebut the requirement of taxation with "the same force and effect" wherever the subject of the tax "may be found."

For example, Louisiana Public Service Commission v. Texas & N.O.R. Co., supra, indicates that the port preference clause was included in the constitution "to prevent preferences as between states in respect of their ports . . . ." The Alaska exemption from the Windfall Profit Tax violates this purpose because it involves the

The Government's brief points out that this is the first case in which a tax has been held unconstitutional for violation of the uniformity provision. Jurisdictional Statement 14. However, that argument does not support the Government's position, because this is also the first excise case in which the Government

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preference of one state over several others, who are in fact parties to this suit.

The United States also relies heavily upon Blanchette v. Connecticut General Insurance Corps., 419 U. S. 102 (1974), which involves the application of the "uniform bankruptcy" clause to the Rail Act. But that case is clearly distinguishable; there, the Court said:

> . . . the Rail Act in fact operates uniformly upon all bankrupt railroads then operating in the United States and uniformly with respect to all creditors of each of these railroads.
>
> The uniformity clause requires that the rail act apply equally to all creditors and all debtors, and plainly this act fulfills those requirements.

Id. at 159-60. The present case is obviously different because holders of interests in oil, who are analogous to the railroads and their creditors, are obviously not treated "equally" or "uniformly" by the Windfall Profit Tax.

As the Blanchette Court said, "No provision of the [Rail] Act restricts the right of any creditor wheresoever located to obtain relief because of regionalism." Id. The Windfall Profit Tax, on the other hand, involves clear distinctions between the right of creditors (holders of interests in oil) because of regionalism.

Furthermore, comparison of the excise tax uniformity clause with the bankruptcy clause is misleading, because the purpose of the requirement of uniformity in the bankruptcy clause was different. It was "to prohibit Congress from enacting private bankruptcy laws." States had "discriminated against British creditors," and "the States' practice of enacting private bills had rendered uniformity impossible." Railway Labor Executives Ass'n v. Gibbons, 102 S. Ct. 1169, 1178 (1982). But while the purpose of the "uniform" bankruptcy clause thus was to prevent discrimination against private citizens, allowing more flexibility on a regional basis, the purpose of the uniform taxation requirement was different and was tied to that of the port preference clause: To protect States against State-by-State regional discrimination. Since the purpose of the "uniform bankruptcy" clause is entirely different from that of the "uniform excise" clause, the bankruptcy cases are not on point, and the reliance of the United States upon them is inappropriate.

has so clearly violated the uniformity clause as to enact an exemption that is expressly geographically defined. Because there is an unbroken line of decisions indicating that geographic uniformity is required, no previous Congress has ever enacted such a tax.

*B. The Alaska exemption is not part of a uniform national plan, because crude oil located in the other forty-nine States is not taxed with "the same force and effect" even though it may be as costly or more costly to produce.*

**(1) There are similar "high production costs" and "high transport costs" in numerous areas throughout the nation, but those areas are not given the preference accorded to Alaska.**

There are many areas in which there are "high production costs"–including offshore areas, areas producing heavy oil, deep oil horizons, and fields requiring secondary and tertiary flooding. The proposition that the exemption in Alaska is cost justified, while hard-to-produce heavy wax crude from Utah is severely taxed, or while production eked out by expensive detergent flooding is in the 70 per cent bracket, or while Baltimore Canyon wells deep in the Atlantic produce dry holes, should not be accepted. These areas are not "uniformly" exempted.[7] In reality, the product itself–crude oil–is what is taxed, and the Alaskan exemption results in its being taxed otherwise than "with the same force and effect in every place where . . . it is found." Cf. United States v. Singer, 15 Wall. 111, 121 (1872) (A tax must be

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7 The Government distinguishes the Alaska exemption in part by rhetoric concerning "windfall profit." E.g., Brief for the United States at 19. The same analysis would lead to the conclusion that there is no "windfall profit" from other areas, such as the Baltimore Canyon, Outer Continental Shelf, secondary and tertiary recovery fields, and the like. In fact, since "windfall profit" is defined without reference to either windfalls or profit, and can exist when a taxpayer has had a loss on overall operations, this argument is particularly unpersuasive.

"assessed equally upon all manufacturers . . . wherever they are. [It may not] establish one rule for one . . . and a different rule for another, but the same rule for all alike.")

(2) The proponents of the tax recognized its non-uniformity in the Congressional debate, and they also recognized that the Alaskan exemption was not based upon cost considerations.

The proponents of the tax recognized the "uniformity" argument in the Congressional debate. As one Senator stated, plans were necessary

> *In the event the courts should find this favorable treatment for Alaska . . . should violate the uniformity provision* in the constitution . . . . [Or] if the courts should find a constitutional objection valid with respect to the Alaskan oil exemption . . . .

126 Cong. Rec. S3056 (Mar. 26, 1980) (emphasis added). The same Senator introduced into the record a memorandum from the Office of the Legislative Counsel, stating that "it may be noted that the issue raised with respect to the Alaskan oil exemption is that *the exemption . . . might be held to violate the constitutional requirement that 'excises shall be uniform* throughout the United States.' " Id. (emphasis added).

The debate not only thus recognized the potential constitutional infirmity, but went on to recognize that the exemption was not cost justified. Senator Long stated that if the exemption were held unconstitutional, then, in that event, the Congress would attempt to pass a provision based upon uniform cost justification.

> As I say, if that [i.e., a declaration of unconstitutionality] were to be the case *we would expect to act in the future to remedy this and to provide some consideration based on the cost of transportation* and the high cost of

developing oil and producing oil in those areas
. . . .

126 Cong. Rec. S3056 (Mar. 26, 1980). The recognition that the current exemption was not cost justified, and that it would have to be replaced "in the future" by a provision "based on the cost of transportation and the high cost of developing oil and producing oil," is crystal clear.

In this connection, it is noteworthy that the next Congress repealed a parallel preferential treatment[8] afforded Alaskan oil from the Sadlerochit Reservoir on the ground that it provided a benefit based solely on regionalism and could not be cost-justified. House Report on Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"), 97th Cong., 2d Sess. 396-97 (1982) (expressly stating that the preference could not "be justified"). Precisely the same reasoning applies to the exemption here at issue. Indeed, the Sadlerochit preference--which Congress has now found cannot be justified, even by a "rational basis"--provides an independent basis for a finding of non-uniformity.

(3) The Alaska exemption is the product not of cost justification, but of a political "combination" of precisely the type the uniformity provision was designed to prevent.

The effects of the Windfall Profit Tax are carefully calibrated to impact upon only a handful of States. In fact, it is striking how the incidence of the tax is concentrated. More than five-sixths of the resulting loss in state tax revenues, for example, will be felt by just two states--Texas and Oklahoma.

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8 Sadlerochit oil was afforded a special, artificial "base adjustment," increasing its "base price." Since the base price is subtracted from the "removal price" (which is usually the selling price) to compute the tax, this base adjustment reduced the tax on Sadlerochit oil. The Sadlerochit base adjustment was originally advanced as a concession to alleged high production and transport costs and was hence similar in nature to the exemption here at issue.

Interstate Oil Compact Commission, *The Effects of the Crude Oil Windfall Profit Tax on Recoverable Crude Oil Reserves* 36 (Library of Cong. 1980).

The tax thus achieved the purpose of shifting its incidence from relatively wealthy states to relatively poor ones. Contrary to myth, Texas and Oklahoma are not among the nation's richest states. Indeed, Texas is average in per capita income, and Oklahoma is significantly below average.[9] By contrast, Alaska is the wealthiest state in the union, and is first in per capita income.[10] The reason for this difference is attributable, in part, to preferential treatment through the windfall profit tax. This honorable Court had occasion to describe Alaska's own windfall in Zobel v. Williams, 102 S. Ct. 2309, 2311 (1982), as follows:

> The 1967 discovery of large oil reserves . . . [in] Alaska resulted in a windfall to the state. The state, which had a total budget of $124 million in 1969, before the revenues began to flow into the state coffers, received $3.7 billion in petroleum revenues during the 1981 fiscal year. This income will continue, and most likely grow for some years in the future.

Thus the sheer impact of the tax, standing alone, would give rise to the inference that it accomplished precisely the sort of discrimination the uniformity provision was designed to prevent.

Furthermore, the circumstances of the Alaska exemption show that it was the product of a political combination. The

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9 U. S. News & World Report, Sept. 27, 1982, at 13.

10 Id. Alaska recently initiated a "share-the-wealth" program in which it gave away a substantial portion of its oil income in the form of "dividends" to citizens. The first such payment was $1000 to each man, woman and child residing in the State. Zobel v. Williams, supra.

debate was filled with venomous and irrational attacks upon "big oil" [11] in the face of clear evidence that the "windfall profit" attributed to such producers simply did not exist.[12] But since oil is to be found in all fifty states, and is produced in significant quantities in several, it became necessary to obtain the votes of certain Senators from oil-producing states. Senator Gravel was one of the most outspoken opponents of the tax, and Senator Stevens was the acting majority leader of the Senate. Their price for supporting the tax was the Alaska exemption and Sadlerochit base adjustment. The Congressional Record makes it clear that Senator Stevens, in particular, was especially instru-

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11 For example, House Floor Manager Rep. Ullman called industry profits "extraordinary . . . [and] staggering." Rep. Vanik said they were "horrendous . . . . They have enough profits stashed away to search all over the moon for oil." Rep. Peyser called these profits "excess;" Rep. Harris, "soar[ing] . . . [resulting from] greed for excess profits." Other Congressmembers variously described industry profits as "a bonanza," "enormous," "skyrocketing," and "unconscionable." Even more intemperate remarks were made in the Senate. 125 Cong. Rec. H2589, H5295, H5305, H5313, (June 28, 1979); 126 Id. E1437 (Mar. 24, 1980); Id. H1848, H1846 (Mar. 13, 1980); Id. S3129, 3138 (Mar. 27, 1980); 125 Cong. Rec. S1849-50 (Dec. 18, 1979); Id. S18290 (Dec. 12, 1979).

In the House, Floor Manager Ullman said his opponents wanted to "give it all to the oil companies." Id. H5312.

The reason for this emotion was an irrational search for someone to blame for the unavailability of cheap oil. Rep. Jenkins explained: "We are witnessing the . . . end of a lifestyle that . . . has depended upon unlimited and inexpensive oil. Consequently, the American people are frustrated, concerned and angry" at oil companies. Id. H5302.

12 Profits of crude oil producers were (and are) not excessive. Treasury Secretary Blumenthal admitted that: ". . . the rates of return . . . in the oil and gas extraction industry . . . are not greater than the average on other manufacturing; they are about the same." Senate Hearings 81. The data available to Congress supported this view. See Senate Report 552, 639. Drug manufacturers earned nearly 50 per cent more but were not taxed. Id. Currently, of course, the industry is in a deep recession; drilling activity is depressed, and oil producers have undertaken massive layoffs of employees.

mental in putting together the combination that passed the tax, and that his price for doing so was favorable treatment for Alaska.[13]

## II. THE GOVERNMENT'S ARGUMENT, THAT THE MERE ARTICULATION OF A "RATIONAL BASIS" CAN SAVE THE EXEMPTION FROM NON-UNIFORMITY, IS INCONSISTENT WITH THE HISTORY AND PURPOSE OF THE CLAUSE.

While conceding that "a literal application" of the uniformity provision would make the tax unconstitutional (Jurisdictional Statement at 14; Cf. Merits Brief at 28), the Government argues that the exemption should nevertheless be upheld because it is "supported by rational considerations," Id. at 16, or a "rational basis," Id. at 18, Merits Brief at 28. This argument would destroy the uniformity provision, is inconsistent with its history and purpose, and should be rejected.

### A. *The Government's "rational basis" argument would make the uniformity provision redundant of the due process clause.*

If the Government's argument is correct, the founders added nothing by including the uniformity requirement in the Constitution, because the due process clause already accomplishes what the uniformity clause is claimed by the Government to accomplish. If a taxpayer must show that there is literally no "rational basis" supporting a tax in order to show that it is not "uniform," then the uniformity provision adds nothing, because

13 The tax was the product of extensive negotiations. After those negotiations, Senators Dole and Byrd, who had been principal participants in the negotiations, stated their thanks to Senator Stevens for his role in bringing about the Windfall Profit Tax. 125 Cong. Rec. S18564, S18566. Senator Stevens expressed his reluctant approval of the compromise and his opposition to any increase in taxation of Alaskan oil. Id. at S18565.

such a powerful showing would prove a violation of even the less rigorous due process standard. Nebbia v. New York, 291 U. S. 502 (1934); Lochner v. New York, 198 U. S. 45 (1905) (Holmes, J., dissenting). It should not be assumed that the founders intended to write meaningless language when they added the uniformity provision.

Furthermore, a mere "rational basis" standard would be inappropriate in this area. When the allocation of tax impacts among states is at issue, a "rational basis" can be found to mask almost any discrimination.[14] As an example, if a state is relatively poor, because it produces little oil or only at high cost, rational basis might be found for exemption merely in the name of tax equity, if such were permitted. On the other hand, if a state seemed likely to produce a great deal of oil, and to become very wealthy, rational basis could be articulated in the name of increasing production. The founders did not intend that the uniformity provision be construed so that every imaginable result could be justified by the articulation of some "rational basis."[15]

B. *The uniformity provision is a specific and unequivocal prohibition, as are, for example, the first amendment, the contract clause, or the fifth amendment, and it should be construed accordingly.*

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14 In this case, even a "rational basis" is actually lacking, unless the purpose is interstate discrimination. Subsidizing the production of expensive oil first, in preference to more readily available alternatives, is irrational. One might just as sensibly subsidize a preference for the harvesting of apples located highest on the tree, that could be picked only by helicopter. The exemption thus makes no sense as an economic measure. As a discrimination between States, it makes sense; this purpose, however, is unconstitutional.

15 It should be re-emphasized that discrimination in federal excise taxes, which concerns the sensitive relationship of the States to the federal government, presents an entirely different problem from variations in regulation of private relationships, such as bankruptcy laws. It is clear that both the purpose and the history of the bankruptcy uniformity clause are different. See note 6 supra.

Unlike the due process clause, the uniformity provision is a specific, narrow and unequivocal prohibition. Unlike the due process clause, it does not apply to all enactments; it only touches upon those that apportion taxes among states. It is a specific standard, directed to a specific evil.

The Government's argument, if applied to the fifth amendment, would allow abolition of the privilege against self-incrimination, subject merely to the requirement that the abrogation be "supported by rational considerations," cf. Jurisdictional Statement 16, Brief of the United States at 28. Similarly, the Government's argument would allow the retroactive impairment of contracts whenever a State could articulate a mere rational basis for doing so. Contra, Allied Structural Steel Co. v. Spannaus, 438 U. S. 234 (1978). The Government's argument would even allow first amendment freedoms to be abridged, likewise, in the name of a rational basis.

At the very least, the uniformity provision should require, not a rational basis, but a compelling governmental interest, such as would be required in the case of a suspect classification under the due process clause, or for an impairment of contracts, or in those rare instances in which infringements of speech are allowed.

*C. The government's "rational basis" argument contravenes the history of adoption of the uniformity provision.*

Under the Articles of Confederation that preceded the Constitution, the States were free from taxation by each other or by the national government. With the Constitution, they granted that power to the national government. The states were acutely aware that this power could be used by political combinations between several States, to impose discriminatory excises or preferences of one port over another.[16]

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16 Such a concern is absent in the case of private bankruptcies, and the bankruptcy "uniformity" provision is entirely different in both his-

The uniformity clause was initially part of the clause prohibiting any preference to the ports of one state over those of any other. "[T]he preference clause . . . and the uniformity clause were . . . treated . . . as one and the same thing, and embodied the same conception." Knowlton v. Moore, supra, 178 U. S. at 106. The two clauses were separated late in the drafting process. Id.

Clearly, the founders did not intend that a tax could be imposed upon the Charleston Harbor in South Carolina while the Boston Harbor was exempted from the tax. Nor would they have accepted the argument that a "rational basis" could support such a discrimination. This conclusion stands even though Boston has a much lower average annual temperature. Indeed, the presence of snow and ice during a substantial part of the year in Boston vastly increases "transport costs" in a way qualitatively different from conditions in Charleston. Nevertheless, there can be no question that the South Carolina delegation would not have urged ratification of the Constitution if such a "rational basis" sufficed to support such a geographically defined discrimination against Charleston in favor of Boston, nor would the delegation from any other State. The Government's "cost justification" arguments contravene the very purpose of the clause.

The error of the Government is in concluding that the uniformity clause is a guarantee, like the due process clause, only of a loose kind of basic fairness. It is not. Instead, it is a compact between the States not to cause the national government to engage in geographically defined exemptions from taxation, even if those exemptions seem to conform to some majority's idea of "fairness" or "rationality." The uniformity provision is intended to be clearcut, specific, and readily enforceable. The founders recognized that the quantum of preference required to be "undue" or the amount of discrimination necessary to be "oppres-

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tory and purpose. See note 6 supra. The heavy reliance placed by the United States on the bankruptcy cases is simply inappropriate.

sive" could be found only in the eye of the beholder.[17] As this honorable Supreme Court said in Hylton v. United States, 3 Dall. 171, 180 (1796), "apportionment . . . involves valuations and assessments . . . . [But] *[u]niformity . . . is at once easy, certain and effacious.*" (emphasis added). The reduction of the uniformity provision to a kind of redundant due process clause would destroy this "certainty, clarity, and efficacy."

The certainty inherent in the uniformity clause is to be inferred, also, from the debate leading to its enactment. An initial proposal required that all taxes be "the same . . . throughout the states *without exemption*." I ELLIOT'S DEBATES 92; cf. 178 U. S. at 96 (emphasis added). The states containing fisheries gave as an example the possibility that a tax on salt might bear most heavily upon them, and the State of Rhode Island expressed concern over discriminatory taxes against commerce to which it was peculiarly a party. I ELLIOT'S DEBATES 101; V ELLIOT'S DEBATES 61; cf. 187 U. S. at 99-100. Even those who felt that the uniformity measure was inadequate because it did not provide sufficient protection understood it as requiring that "excises shall be uniform--*that is, to be laid in the same amount on the same articles in each state.*" I ELLIOT'S DEBATES 396 (Report of Luther Martin) (emphasis in original); cf. 178 U. S. at 106. The court in Knowlton v. Moore summarized these concerns by citing a proposal by Madison that eventually led to the uniformity requirement, by which, according to the court, taxes were "designed to be *the same* all over the union." 178 U. S. at 100 (emphasis in original).

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17 The Government repeatedly characterizes the Constitution as forbidding only "undue" preferences. Neither the port preference clause nor the uniformity provision, however, can reasonably be construed to depend on the extent of the improper preference. In any event, this enactment places five-sixths of its state tax impact upon just two States, see part I (B) (3) supra, while completely exempting a large geographic part of another State; and if such an impact is not "undue," the idea of an "undue preference" is meaningless.

## CONCLUSION

The American Revolution was fought largely because of concerns over unfair taxes. The Stamp Tax, the Intolerable Acts, and the Boston Tea Party are part of every school child's education. The Constitution of the newly formed nation contained not one, but several provisions designed to prevent discriminatory or inappropriate taxation. Geographic regionalism in tax impact was a core concern of the Founders of this Republic. It is inconceivable that they intended the uniformity clause to be interpreted as the Government here argues.

This Court should reject the contention of the government that a mere "rational basis" can justify non-uniformity. If a rational basis is present here, it can be found to justify any discrimination. The Court should also reject the argument that a geographical discrimination can stand so long as it is not in the eyes of some majority, "undue." These arguments would destroy the uniformity requirement. Furthermore, this particular tax--the impact of which is concentrated upon a handful of States and which geographically exempts another State because its Senators had influence in Congress--contravenes the basic purpose of the uniformity clause. This exemption is obviously not part of a uniform national plan based on costs, because oil in other areas that is more expensive to produce or transport is not exempted. The judgment of the district court should be affirmed.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that I have, prior to the filing of this Brief, served three (3) copies each upon all counsel of record by depositing such copies in a United States Post Office, namely the Central Post Office at Houston, Texas, first class postage prepaid, addressed to: Harold B. Scoggins, Jr., Independent Petroleum Association of America, 1101 16th Street, N.W., Washington, D.C. 20036; William H. Brown, Brown, Drew, Apostolos, Massey and Sullivan, 500 Petroleum Building, Casper, Wyoming 82601; Andrew Kever, Assistant Attorney General, Chief, Energy Division, P. O. Box 12548, Capitol Station, Austin, Texas 78711; Lawrence G. Wallace, Acting Solicitor General, Department of Justice, Washington, D.C. 20530; and Gene W. Lafitte, Liskow & Lewis, One Shell Square, 50th Floor, New Orleans, Louisiana 70139; all in accordance with Rule 28.3 of the Rules of this Court.

No. 82-1066

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

---

UNITED STATES OF AMERICA,
*Appellant*

v.

HARRY PTASYNSKI, *et al.*

---

On Appeal from the United States District Court
for the District of Wyoming

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## BRIEF *AMICI CURIAE* OF SENATOR DON NICKLES, CONGRESSMEN MICKEY EDWARDS, JACK FIELDS, RON PAUL AND THE WASHINGTON LEGAL FOUNDATION

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## QUESTIONS PRESENTED

1. Whether the exclusion of certain categories of Alaskan oil from the coverage of the Crude Oil Windfall Profit Tax Act of 1980, violates the Uniformity Clause of the Constitution.

2. Assuming the answer to Question No. 1 is in the affirmative, whether the constitutionality of the remaining provisions of Title I of the Crude Oil Windfall Profit Tax Act should be upheld.

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## BRIEF *AMICI CURIAE* OF SENATOR DON NICKLES, CONGRESSMEN MICKEY EDWARDS, JACK FIELDS, RON PAUL AND THE WASHINGTON LEGAL FOUNDATION

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### INTERESTS OF *AMICI CURIAE*

Senator Don Nickles, Congressmen Mickey Edwards, Jack Fields, Ron Paul and the Washington Legal Foundation appear before this Court as *amici curiae* with the written consent of appellee-taxpayers, appellee-intervenors and appellant, the United States Government. The written consent of all parties to this suit is contained in letters which have been filed with the Clerk of this Court.

Senator Don Nickles is a United States Senator from Oklahoma. Congressman Mickey Edwards is a United States Representative from Oklahoma. Congressmen Jack Fields and Ron Paul are United States Representatives from Texas.

Each of the congressional *amici* listed above has since the time he was elected exercised his legislative prerogative on various legislative matters concerning constitutional issues. The movant Congressional *amici* seek to act as friends of the court in the instant case since it raises vital issues of constitutional law and revenue raising.

The Washington Legal Foundation (WLF or Foundation) is a national non-profit public interest law center that engages in litigation and the administrative process in matter affecting the broad public interest. WLF has more than 85,000 members throughout the United States, including the States of Texas and Louisiana, whose interests the Foundation represents.

WLF participates in and devotes a substantial portion of its resources to domestic matters raising important constitutional issues.

Briefs *amicus curiae* of the Foundation have been filed with and accepted by the United States Supreme Court in cases such as *United Steel Workers v. Weber*, 443 U.S. 193 (1979); *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979); *General Building Contractors Assoc., Inc. v. Commonwealth of Pennsylvania*, 102 S.Ct. 3368 (1982); *City of Revere v. Massachusetts General Hospital*, No. 82-63; and *Boston Firefighters Union v. Boston Chapter, NAACP*, No. 82-185.

*Amici* can bring to this case a perspective not adequately represented by the other parties. Whereas the appellees are concerned primarily with being relieved of, and the appellant is concerned with preserving the heavy tax burden imposed by the Crude Oil Windfall Profit Tax Act of 1980, *amici* are aware of the broader picture.

In the instant case, *amici* urge this court to uphold the decision of the United States District Court for the District of Wyoming declaring the Windfall Profit Tax unconstitutional. *Amici* believe that any reversal of the district court's decision poses the threat of judicial legis-

lation. In the interest of the Constitution, our cherished system of checks and balances and ultimately the American public, *amici* seek to ensure that the constitutional framework so carefully and meticulously crafted by our forefathers is preserved.

## STATEMENT OF THE CASE

*Amici* adopt the recitation of facts contained in the brief for the United States in the interest of judicial economy.

## SUMMARY OF ARGUMENT

*Amici* submit that the United States District Court for the District of Wyoming correctly held the Crude Oil Windfall Profit Tax Act of 1980, 26 U.S.C. § 4986, unconstitutional because the Alaska oil exemption, 26 U.S.C. § 4994(e), violates the uniformity requirement for Congressional tax acts under Article I, § 8, cl. 1 of the United States Constitution.

*Amici* further submit that the Act was the product of careful negotiation and compromise, that without such negotiation and compromise the Act would not have been passed in its present form, and thus under existing law the unconstitutional portion of the Act is not severable.

Finally, *Amici* contend that for this Court to uphold the remainder of the Act while striking the invalid portion would amount to judicial legislation and a usurpation of the powers and duties entrusted to the Congress by our Constitution.

## ARGUMENT

### I. THE CRUDE OIL WINDFALL PROFIT TAX ACT OF 1980 VIOLATES THE UNIFORMITY CLAUSE OF THE UNITED STATES CONSTITUTION.

In the opinion below, the district court correctly held that the Alaska exemption provision, 26 U.S.C. § 4994(e), violated Article 1, § 8, cl. I of the Constitution.

The basis of this decision is sound. The exemption in question allows certain Alaska-produced oil (generally, any produced above the Arctic Circle or the Alaska-Aleutian Range divide) to be free from tax while oil produced elsewhere in the United States is to be taxed at various rates.

This inconsistent treatment based solely upon geography is unconstitutional. Article I, § 8, cl. 1 of the U.S. Constitution provides:

> That Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises . . . but all Duties, Imposts and Excises shall be uniform throughout the United States.

As the district court noted, the power of the Congress to levy and collect taxes is very broad. A tax may be extremely burdensome, even to the point of hindering or destroying an entire industry. *McCray v. United States*, 195 U.S. 27, 62-63 (1904). It may be "unwise or injurious." *Champion v. Ames*, 188 U.S. 321 (1903).

However, such a tax must be "uniform throughout the United States." It has been well-settled that uniformity has been interpreted to mean geographical uniformity. *License Tax Cases*, 5 Wall. 462 (1866); *Knowlton v. Moore*, 178 U.S. 41 (1900); *McCray v. United States*, *supra.*

Moreover, this geographical uniformity requires that wherever the subject of a tax is found, it must be taxed equally in whatever place or quantity. *Head Money*

*Cases*, 112 U.S. 580 (1884). The intent is to prevent economic discrimination among the various states. *Downes v. Bidwell*, 182 U.S. 244, 278 (1901).

In the *Head Money Cases*, *supra*, a head tax on foreigners entering American ports by "steam or sailing vessel" was challenged as a violation of the uniformity clause since it did not tax foreigners entering the United States by other means to inland destinations, such as by rail. This Court upheld the tax noting that though only coastal states had ports, due to physical geography, "the law applied to all ports alike, and evidently gives no preference to one over another, but is uniform in its operation in all ports of the United States." *Id.* at 595.

Thus, in borrowing appellants' analogy of a hypothetical excise tax on the harvesting of citrus fruits (Brief for Appellant at 33), even though only a few states are capable of growing such a product, the tax would have to be applied with equal force (but not effect), wherever the fruit was found. In other words, under the *Head Money Cases*, *supra*, it would be a violation of the uniformity clause if Congress exempted all citrus fruit harvested south of Orlando, Florida. This would be so even if the reason for the exemption was the high cost of transportation to the New York market. Such a geographically defined distinction would be unfair to other citrus growing states, such as California.

Similarly, due to the forces of nature, not all states have oil, but where it is found, and removed, it must be taxed without regard to which state it happens to lie within.

Appellant claims the uniformity clause is intended to prevent "combinations" of states from aligning themselves against one another. Brief for Appellant at 26, 27. By implication appellant would have us believe the clause does not apply to the Congress itself, or if it does, then only where Congress singles out more than one state for different tax treatment. However, the cases cited above

make no mention of such a limitation. Rather, the clause has been interpreted to require consistent treatment of all the states at the hands of the federal government.

Furthermore, having a "good reason" or "justification" for making a geographical distinction appears to be irrelevant since the uniformity clause is an absolute prohibition against preferential treatment of one or more states over others based solely upon geography. The district court notes that legitimate tax exemptions may exist, so long as they are not forbidden by the Constitution. Nowhere in the above cited cases have *amici* found language to the effect that the uniformity clause shall not apply if the Congress can find a good reason to ignore it.

Appellant also claims the district court's opinion forbids any consideration of geographical factors. Brief for Appellant at 9. Appellant has misconstrued the opinion of the court. Congress should, and does, consider a whole range of information relevant to any proposed legislation, geographical factors included. But in enacting a bill, the legislation must neither grant nor impose different tax treatment among the states.

Finally, appellant suggests that the bankruptcy clause, article I, section 8, clause 4 of the Constitution is comparable to the uniformity clause. Brief for Appellant at 35. Appellant cites the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), as authority for the power of Congress to ". . . fashion legislation to resolve geographically isolated problems." *Id.* at 159. On the contrary, the Court in that case held that in acting on the problems of rail carriers in the region defined in the Rail Act, Congress complied with the uniformity requirement when it applied the act to every railroad undergoing reorganization in the country. *Id.* at 158-161.

## II. THE INVALID PORTION OF THE ACT IS NOT SEPARABLE AND THEREFORE THE ENTIRE ACT MUST FALL.

The test for whether an act will stand after an invalid portion is removed is given in *Carter v. Carter Coal Co.*, 298 U.S. 238, 312 (1936) which holds that if the legislation would have passed even with the invalid features removed, then it may stand, but if without the stricken portion it *would not* have passed, then it is not separable and the Act in its entirety must fall.

This principal is also stated in *Williams v. Standard Oil Co.*, 278 U.S. 235, 242 (1929) and in *Utah Power & Light Co. v. Pfost*, 286 U.S. 165, 184-185 (1932).

The problem, then, is to determine whether or not Congress would have passed this Act without the Alaska exemption.

A perusal of the Congressional Record covering the relevant period indicates that the Windfall Profit Tax was very controversial and was only enacted after much Congressional debate and compromise. *See* 125 Cong. Rec. S 18564 (daily ed. December 14, 1979); 126 Cong. Rec. S 1685, 1694-1699 (daily ed. February 21, 1980); 126 Cong. Rec. S 2771, 2773-2774 (daily ed. March 20, 1980).

These same records indicate the Alaska exemption was a significant part of the final Act as adopted. H.R. Rep. No. 304, 96th Cong., 2d Sess. 30, reprinted in 1980 U.S. Code Cong. & Ad. News 587, 612-13.

Past decisions have promulgated a variety of tests to determine the severability of the Alaska exemption. Is the exemption so inseparably connected with the entire Act so that both must stand or fall together? Are the remaining portions, after the elimination of the Alaska exemption, sufficient to accomplish their legislative purpose? Was the Alaska exemption the inducement for the the passage of the Act?

The Alaska exemption operates to limit the scope of the Act. Striking the Alaska exemption would give the Act a broader scope by including territory not previously included and would give rise to the presumption that Congress would not have been satisfied with the legislation as such.

Great weight has been given by appellant to comments of Senator Russell Long of Louisiana. 126 Cong. Rec. S 3055-3056 (daily ed. March 26, 1980). Appellant suggests that a comment by Senator Long establishes a monumental congressional preference that any invalid portion of the Act be severed and the remaining portions of the Act enforced. Brief for Appellant at 48. However, Senator Long's last minute insert fails to provide a sufficient basis to determine whether Congress would have passed the Act without the Alaska exemption. The comment stands for the view of only one Senator. The fact that no other Senator expressed a view contrary to his does not indicate that the entire Congress supported his statement. *American Smelting & R. Co. v. Occupational S. & H. R. Comm.*, 501 F.2d 504, 509 (8th Cir. 1974).[1]

The Senate was aware of the constitutional problem prior to the adoption of the conference report and failed to take any meaningful measure to eliminate the expos-

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[1] *Amici* note with interest that Senator Long has since repudiated his earlier position. In a news release dated November 5, 1982 Senator Long stated: "The Windfall Profits Tax has outlived its usefulness. It is a heavy burden on production. It should be repealed and the courts would do the nation a favor by declaring it unconstitutional." Again on November 10, 1982 Senator Long declared in another news release that issued from his office that: ". . . the Windfall Profits Tax is a hefty burden on production and should be striken from our laws. The Wyoming district court has done the nation a favor by declaring it unconstitutional." Finally, on November 11, 1982, it was widely reported that Senator Long had actually urged the United States government not to appeal the federal court's ruling in this case. *See e.g.*, Shreveport Times, Nov. 11, 1982 at 24A, col. 4.

ure of the Act to constitutional scrutiny. The Alaska exemption could have been eliminated or modified but Congress chose not to do so. It has manifested its intent to maintain the Act in its entirety. This Court should allow Congress the opportunity to rewrite this legislaton so that it clearly reflects the will of the legislators and complies with the Constitution.

## III. FOR THE COURT TO ALLOW THE ACT TO STAND WITHOUT THE ALASKA EXEMPTION WOULD AMOUNT TO JUDICIAL LEGISLATION.

In recent years the courts have come under increased criticism for judicial activism. This expanding role is improper when it usurps the powers and duties of the various legislatures. In doing so, the courts have interfered with our cherished system of checks and balances and have occasionally strayed into judicial legislation.

The instant case contains the potential for judicial legislation. If the Alaska example is found to be unconstitutional and is stricken from the Act, and if the Court were to allow the remainder of the Act to stand, the effect would be to broaden or extend the Act's coverage to oil which was never intended to be covered.

It is a well-settled rule that it is improper for courts to legislate. "A statute may not, under the guise of interpretation, be modified, revised, amended, distorted, remodeled or rewritten." *Matson Nav. Co. v. United States*, 284 U.S. 352 (1932); *Sacramento Nav. Co. v. Saltz*, 273 U.S. 326 (1926); *Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1926). "Courts should avoid entry into the legislative field." *Ebert v. Poston*, 266 U.S. 548 (1924); *Holden v. Stratton*, 198 U.S. 202 (1904).

In a lecture before the New York City Bar Association in 1947, Felix Frankfurter commented on the role of the judiciary in interpreting statutes.

> Even within their area of choice the courts are not at large. They are confined by the nature and scope of the judicial function in its particular exercise in the field of interpretation. They are under the constraints imposed by the judicial function in our democratic society. To go beyond it is to usurp a power which our democracy has lodged in its elected legislature. The great judges have constantly admonished their brethren of the need for discipline in observing the limitations. A judge must not rewrite a statute, neither to enlarge nor to contract it.

Some reflections On The Reading Of Statutes. F. Frankfurter 6th Annual Benjamin J. Cardozo Lecture. (March 18, 1947).

In *United States v. Reese*, 92 U.S. 214 (1975) the Court was asked to uphold the validity of a penal statute by limiting the general wording so as to allow a provision to pass constitutional muster. Chief Justice Waite said, at 221,

> We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is constitutional, if there be any such, from that which is not. The effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not there now. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only . . . To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty.

Similar reasoning was applied in the *Trade Mark Cases*, 100 U.S. 82 (1879) when this Court was asked to save a federal statute which was to apply to "trademarks" generally, by construing it to apply to trademarks

used in interstate commerce, thereby keeping it within constitutional bounds. This Court said: "If we should . . . undertake to make by judicial construction a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do; namely, make a trade mark law which is only partial in its operation." *Id.* at 98.

In the cases discussed above, the Court was asked to narrow the scope of federal statutes to save them from extinction. For this Court to permit the Crude Oil Windfall Profit Tax Act to stand without the Alaska exemption would be far more inappropriate than anything it was asked to do in those cases. The effect would be to extend the Act and the tax to areas of Alaska which Congress itself did not do or seek to do. We cannot think of a clearer example of judicial legislation.

A federal district court was faced with a similar problem in *Weeks v. United States*, 406 F. Supp. 1309 (W.D. Okla. 1975). In this case a group of Indians challenged the constitutionality of statutes which were to distribute awards to certain other Indian groups arising out of treaties which had been violated by the federal government. The Court ruled that the plaintiff Indians were entitled to a share of the awards, but that to do so would require extention of the statutes' provisions, and that because the Court could not speak for Congress the entire statute had to be declared invalid due to the unconstitutional distributive provisions. In other words, to have ruled otherwise would have extended coverage beyond that which Congress clearly intended, thus the entire act had to fall.

This legal argument is nicely summarized in 2 SUTHERLAND, STATUTORY CONSTRUCTION, § 44.13 (4th ed. 1972):

> When an exception, exemption, provision, or any clause which limits the scope of an acts applicability is found to be invalid, the entire act may be void on

> the theory that by striking out the invalid exception the scope of the act has been widened and therefore cannot properly represent the legislative intent. To extend the scope of an act's operation by invalidating a provision of limitation while allowing the remainder to continue in effect invites criticism on the ground that it amounts to judicial legislation.

That it is vital to our democracy to retain the traditional separation of the three branches of government is unarguable. It is therefore submitted that this Court should do its part in carefully preserving that balance.

## CONCLUSION

For the reasons stated above, the Washington Legal Foundation submits that the federal district court was correct in its decision and that it should in all respects be affirmed.

Respectfully submitted,

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* *Amici* wish to express their appreciation to Richard D. Warfield, legal intern, for his valuable assistance in the preparation of this brief.

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*Appellees*.

On Appeal from the United States District Court
for the District of Wyoming

## BRIEF *AMICUS CURIAE* OF THE STANDARD OIL COMPANY

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

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No. 82-1066

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UNITED STATES OF AMERICA,
*Appellant*,

v.

HARRY PTASYNSKI, *et al.*,
*Appellees*.

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**On Appeal from the United States District Court for the District of Wyoming**

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## BRIEF *AMICUS CURIAE* OF THE STANDARD OIL COMPANY

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This brief in support of appellant is submitted with the written consent of counsel to all parties, copies of which have been filed with the Clerk of the Court.

## INTEREST OF THE *AMICUS CURIAE*

The *amicus curiae* is The Standard Oil Company, an Ohio corporation which with its subsidiaries is commonly referred to as "Sohio." Sohio owns more than 50 percent of the Prudhoe Bay oil field in Alaska as well as producing and exploratory leases in arctic areas encompassed by the exemption at issue.

Sohio has participated in the exploration for and production of oil in Alaska since 1970 and has for many years been involved in exploration and production in the lower-48 states. It has considerable experience with the peculiar problems associated with petroleum development in the harsh arctic environment. As operator of half the Prudhoe Bay field, Sohio is familiar with the economic, climatic, ecological, and regulatory burdens that confront petroleum

activity in this environment and that, in the aggregate, far exceed those experienced elsewhere in the United States. Sohio's experience in the American Arctic[1] is being further expanded as it undertakes the enormously expensive exploration and development of recently acquired offshore leases in the Beaufort Sea and Norton Sound.

The acquisition of these arctic leases at a cost of more than $400 million, together with the substantial amounts necessary to develop those leases, indicates Sohio's continuing commitment to development of petroleum reserves in Alaska and the offshore arctic. Sohio is concerned, however, that affirmance of the district court holding concerning unconstitutionality of the "Alaska exemption," coupled with reversal on the severability issue, will adversely affect the economics of exploration for and production of crude oil in the arctic regions of this country and reduce the potential for additional production from those promising areas.

During Congress' consideration of the Crude Oil Windfall Profit Tax,[2] Sohio and others testified to the extraordinary burdens experienced in the development of arctic reserves. Congress recognized that the addition of a significant tax burden on new oil from these regions would frustrate national energy policy by impeding exploration and production in areas estimated to contain one-third of the undiscovered domestic petroleum reserves.[3]

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[1] For ease of reference this Brief will use the term "American Arctic" to refer collectively both to those areas of the United States that are north of the Arctic Circle and to those subarctic regions (*i.e.*, those areas immediately south of the Arctic Circle) that exhibit substantially the same climatic and environmental conditions. In the same vein, references to "arctic" will encompass such subarctic areas as well.

[2] Pub. L. No. 96-223, §§101-103, 94 Stat. 229-56 (1980).

[3] While Congress received testimony to this effect, recent studies suggest that as much as 50 percent of the undiscovered recoverable oil resources in the United States occur in the arctic. National Petroleum Council, U.S. Arctic Oil & Gas 20 (1981).

This brief is in support of the Government's position that the Crude Oil Windfall Profit Tax exemption for "exempt Alaskan Oil"[4] is compatible with the uniformity clause of the Constitution.[5] Sohio does not express an opinion regarding the issue of severability and takes no position with respect to those allegations of unconstitutionality of the windfall profit tax not before the Court. It is not Sohio's intent to burden the Court with a lengthy repetition of the arguments made in the Brief for the United States. Rather, Sohio seeks to expand the arguments made in support of the Alaska exemption from the perspective it has gained during more than 13 years of intensive exploration, development, and production activity in the North Slope area of Alaska to show that Congress was justified in concluding that new oil produced in this hostile frontier area should, in pursuit of national energy policy, be placed in a separate classification and accorded special treatment under the windfall profit tax.

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[4] The exempt category is defined at 26 U.S.C. §4994(e). Although the statute refers to this exempt category as "exempt Alaskan oil," this label does not accurately describe the scope of the exemption. As can be noted from the statistics set forth at page 21 of the Brief for the United States, nearly 90 percent of Alaska-produced oil is subject to the windfall profit tax. Sohio has paid over $2 billion in windfall profit tax on its American Arctic production, only a small fraction of which is presently classified as "exempt Alaskan oil." Moreover, it is reasonably expected that much of the oil qualifying for the exemption will be produced not in Alaska but from outer-continental shelf areas beyond the state boundaries. Thus, despite the "Alaska" label, most Alaska oil is not exempt, and most exempt oil will likely not be produced in Alaska. As a result, the exemption cannot be said to reflect any congressional intent to confer a benefit on Alaska or Alaskan producers. Nevertheless, for ease of reference, this Brief will continue to refer to the exemption at issue as the "Alaska exemption" and to the exempt category as "exempt Alaskan oil."

[5] Article I, Section 8, clause 1 of the Constitution provides, in pertinent part, that "all Duties, Imposts and Excises shall be uniform throughout the United States."

## SUMMARY OF ARGUMENT

Congress has broad latitude in selecting the subjects of taxation. While the Framers limited this congressional discretion to the adoption of "geographically uniform" excise taxes, they did not preclude Congress from addressing regional issues of legitimate concern nor from using geographic terms to describe permissible non-geographic distinctions. Because the Alaska exemption serves these permitted objectives, it does not violate the uniformity clause restriction on the discretion of Congress to select the subjects of its taxing power.

The windfall profit tax was the result of a congressional effort to balance the taxation of deregulation revenues on the one hand and the encouragement of additional production on the other. Congress determined that arctic exploration and production were confronted with distinctive burdens that created inherent economic disincentives to production in that region, despite its great potential reserves. As a result, Congress concluded that arctic production was likely to show a very substantial response to increased decontrol revenues. The exemption of certain oil produced in the American Arctic was thus a proper classification based on the legislative objective to encourage production of those categories of oil which Congress judged most likely to achieve a substantial increase in production in response to higher prices. Unless this legislative objective is itself constitutionally objectionable, the congressional judgment that the exempted oil is entitled to special tax treatment should not be second-guessed by the courts.

Reversal of the District Court in this case will not dilute the uniformity clause. Even if a rational basis standard of review is applied to test the legislative classification, the Court has demonstrated in the past that this standard is sufficient to safeguard important societal interests. Moreover, where geographic terms are used to fulfill a legitimate

legislative objective, the Court may conclude that the interests protected by the uniformity clause call for a somewhat more rigorous analysis requiring the challenged classification to have a fair and substantial relationship to the legislative objective. Even under the standard of fair and substantial relationship, however, the Alaska exemption passes muster and should be sustained.

## ARGUMENT

### I. The Uniformity Clause Is Sufficiently Flexible to Permit Congress to Address Regional Problems.

Congress is accorded broad latitude in selecting the subjects that it will tax. For example, in *Flint v. Stone Tracy Company*, 220 U.S. 107 (1910), a taxpayer challenge to the corporate income tax on the ground that it arbitrarily taxed business conducted in corporate form while exempting identical non-corporate enterprises was rejected because "[i]n levying excise taxes [Congress has] the most ample authority . . . to select some and omit other possible subjects of taxation, to select one calling and omit another, to tax one class of property and to forbear to tax another." *Id.* at 158. Similarly, some years earlier the Court had said that "it is not part of the function of a court to inquire into the reasonableness of the excise either as respects the amount, or the property upon which it is imposed." *Patton v. Brady,* 184 U.S. 608, 623 (1902).

Nevertheless, the Framers intended the uniformity clause to restrict this congressional discretion insofar as excise taxes are concerned. The Court has long interpreted this restriction to require "geographic uniformity" — *i.e.*, that "[t]he tax . . . operates with the same force and effect in every place where the subject of it is found." *Head Money Cases*, 112 U.S. 580, 594 (1884). One leading commentator has succinctly summarized this restriction as providing that Congress "may not discriminate . . . on the basis

of location" in selecting the subjects that shall be taxed. L. Tribe, *American Constitutional Law* 252 (1978). Thus, the uniformity clause restricts Congress' otherwise broad discretion to impose excise taxes by prohibiting it from distinguishing between subjects solely on the basis of where the subject is located.

The Court has plainly recognized that this restriction is not an inflexible rule that precludes Congress from describing the subject in geographic terms if this serves to focus the legislation on special circumstances that exist in a particular geographic region of the country. Thus, in construing the parallel uniformity provision in the bankruptcy clause,[6] the Court referred to "the flexibility inherent in the constitutional provision" and concluded that

> "The uniformity provision does not deny Congress power to take into account differences that exist between different parts of the country and to fashion legislation to resolve geographically isolated problems. The problem dealt with . . . may present significant variations in different parts of the country. We therefore agree . . . that the uniformity clause was not intended to hobble Congress by forcing it into nationwide enactments to deal with conditions calling for remedy only in certain regions."

*Regional Rail Reorganization Act Cases*, 419 U.S. 102, 158-59 (1974) (internal quotations and citations omitted).

As is discussed below and as was described to Congress, exploration and production activity in the American Arctic is subject to substantial "geographically isolated problems" that could cause the windfall profit tax to have a

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[6]Article I, Section 8, clause 4 of the Constitution provides that "[t]he Congress shall have Power . . . [t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."

significant negative impact on future exploration and production in that region far beyond any similar impact likely to result in other regions of the country. The District Court, however, turned a deaf ear to all such considerations. In particular, it failed to consider congressional determinations of "significant variations in different parts of the country" as to the impact that the windfall profit tax would have on the level of petroleum production. As a result, it improperly applied the uniformity clause so rigidly as to handcuff Congress in its efforts to fashion a windfall profit tax consistent with the national objective of increased oil production.[7]

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[7]It is argued that "Congress does not have the power to ignore the constitutional requirement of geographic uniformity in order to accommodate special circumstances purportedly existing in a limited geographic area." Motion of the State of Louisiana to Affirm at 14. The issue, of course, is not whether Congress may ignore the requirement of geographic uniformity, but whether that concept is sufficiently flexible to permit classifications based on geographically different circumstances. The Court is asked to retreat from its position in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), recognizing such flexibility in the concept of geographic uniformity. Such retrenchment, however, would be unwise since the flexibility that this Court contemplated is necessary to the fashioning of laws governing such a geographically diverse land as the United States of America.

Even when the Constitution was drafted, this was a large country, and it must be presumed that the Framers were mindful that Congress would confront "geographically isolated problems" and "significant variations in different parts of the country," and that they had no intention to "hobble Congress" in its efforts to fashion excise taxation around such circumstances. *Id*. at 159. The country has since expanded to encompass half a continent, which has caused a widening of regional differences. This reinforces the Court's wisdom in concluding that the uniformity requirement should not be construed as "forcing [Congress] into nationwide enactments to deal with conditions calling for remedy only in certain regions." *Id*. The Court has ample means to police the activities in this area to assure that this flexibility is not abused to frustrate the interests protected by the uniformity clause.

## II. There Are Sufficient Differences Between Exempt Alaskan Oil And Non-exempt Oil to Support the Exemption.

Congress made its intent clear that the greatest burden under the windfall profit tax was to be placed on those categories of oil the production of which was least likely to increase substantially in response to the higher revenues generated from the decontrol of oil prices, while the smallest burden would be imposed on oil the production of which appeared most likely to show a substantial increase as a result of decontrol revenues. This consideration was prominent both in Congress' structuring of the various tiers and in the exemptions carved out from the tax. Thus, for example, the Senate Report explained that

> "In designing the tax, the committee attempted to reduce or eliminate the tax burden on those types of oil the production of which is likely to be relatively sensitive to changes in tax rates or prices. It tried to maintain a higher tax burden on types of oil whose production is likely to be less sensitive to price changes."

S. Rep. No. 96-394, 96th Cong., 1st Sess. 2 (1979). In the same vein, the Senate Report stated that "for categories of oil where the production response is likely to be the greatest, the windfall increases smaller, or production costs greater, the committee has given special tax treatment." *Id.* at 27.

The Ways and Means Committee Bill, as the House Report explained, reflected fundamentally the same approach:

> "The committee's windfall profit tax is carefully designed to impose relatively high tax rates where production cannot be expected to respond very much to further increases in price and relatively low tax rates on oil whose production is likely to be responsive to price. The lowest tax burden will be on newly discov-

ered oil, incremental oil produced on properties using tertiary recovery techniques, and Alaskan oil."

H.R. Rep. No. 96-304, 96th Cong., 1st Sess. 7 (1979). The House Report went on to state that "[t]he committee believes that a relatively heavy tax on tier one and tier two oil, along with the more lenient treatment of newly discovered Alaskan and tertiary oil, strikes the appropriate balance between revenue needs and production incentives." *Id.* at 14. In the final analysis, the same chord was struck by the Conference Committee, where the ultimate contours of the exemption were fashioned, when it stated that "[t]he exemption of Alaskan oil production for the designated locations reflects the concern of the conferees that taxation of this production would discourage exploration and development of reservoirs in areas of extreme climatic conditions." H.R. Conf. Rep. No. 96-817, 96th Cong., 2d Sess. 103 (1980).

Thus, Congress classified domestic oil production not according to differences in the physical properties of the oil but rather according to the anticipated response of each category of production to enhanced revenues that decontrol would afford the producer. In so doing, Congress inevitably had to take account of the economic, geological, and environmental circumstances that created inherent incentives or disincentives to continued production of each type of oil. The hearings and reports of the congressional committees reveal that Congress received substantial evidence from which it could make a reasonable and intelligent assessment of these factors and from which it proceeded to define the various categories of oil and to assess the impact that increased producer revenues would have on each category.[8] Because of the extraordinary burdens that confront

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[8]*See, e.g.*, Crude Oil Tax, *Hearings Before the United States Senate Committee on Finance on H.R. 3919*, 96th Cong., 1st Sess. 222-60, 362-95 (1979); S. Rep. No. 96-394, 96th Cong., 1st Sess. 37-52 (1979); H.R. Rep. No. 96-304, 96th Cong., 1st Sess. 7, 13-15, and 16-31 (1979).

production in the arctic regions, Congress concluded that oil production from those areas would be highly sensitive to enhanced decontrol revenues and that the objectives of the windfall profit tax would be best served by exempting such oil from the tax.

### A. The Burdens Confronting Oil Production in the American Arctic Regions are Extraordinary.

In testimony before the Senate Finance Committee, John H. Lichtblau, a noted expert on petroleum economics, described Alaska arctic production as "the most costly frontier oil ever discovered in the United States." Crude Oil Tax, *Hearings Before the United States Senate Committee on Finance on H.R. 3919*, 96th Cong., 1st Sess. 306 (1979) (hereinafter "Senate Hearings"). The truth in that assertion is easily demonstrated by a brief review of some of the burdens that oil must carry. Although other frontier areas of the United States face some of the same difficulties experienced in exploring for and producing crude oil in the arctic, the exempted areas are unique in confronting the most extreme combination of logistic, climatic, environmental, and regulatory conditions.

#### *1. Unique Logistics.*

The Alaska North Slope and interior and the adjoining arctic continental shelf are extremely remote. Oil discovered in those regions is valuable only if it can be economically transported to the markets in the South. To reach those markets, North Slope production must be first transported 800 miles through the $9.3 billion Trans Alaska Pipeline System (TAPS) to the port of Valdez, Alaska, and then by tanker from Valdez 2000 miles to ports in California or 6500 miles through Panama to the Gulf Coast. No other domestic production is subject to the staggering transportation costs of Alaska North Slope crude oil. These costs, ranging from $8.00 to $10.50 per barrel, are more than ten

times the average cost of transporting lower-48 production to market.

Moreover, remoteness impacts not only the cost of transporting crude oil from the arctic, but also the cost of exploration, development, and production. Because few products are manufactured in Alaska, virtually every bolt, nut, and washer must be transported from the lower-48 states or abroad. The North Slope can be reached by truck only over the 360 mile "haul road," specially constructed to service the oil development at Prudhoe Bay, by airplane or helicopter or, during a four to six week period when the ice melts in the Bering Sea, by ocean-going barge, an 6,000 mile round trip from Seattle, Washington. Because of these long and hazardous supply lines, everything costs more. For example, when the annual operating cost of a lift truck was $60,000 in Cleveland, Ohio, it cost $250,000 per year to operate the same truck on the North Slope.

2. *Climatic Conditions*.

The climate in the American Arctic is like nothing experienced elsewhere in the United States. Winter lasts for eight months, with subfreezing temperatures predominating from October to May. Temperatures of -60°F are not uncommon, and the winter mean temperature is -20°F. During winter storms, the wind chill factor can fall below -100°F.

In such a hostile climate, costs escalate dramatically. Equipment must be kept running 24 hours a day to prevent freezing, protective outerwear impedes even the simplest of tasks such as writing notes or handling tools, and minor failures become life-threatening crises. Additional costs are incurred to maintain safety and employee morale in a work environment where the sun sets on November 18 not to rise again until the following January 24.

A major consequence of these extreme climatic conditions and the environmental constraints described below is that many traditional production techniques prove ineffective. Enormous expenditures have been required to design and develop new methods of production to suit these extraordinary circumstances. Sohio has spent huge sums in research and development for this purpose.

*3. Environmental Obligations.*

Like the climatic conditions, the arctic environment, both onshore and offshore, is unique in the United States. The onshore areas are primarily arctic tundra underlain by permanently frozen ground called permafrost. The fragile tundra vegetation insulates the permafrost preventing all but a very shallow layer from melting. If the tundra is disturbed, its insulating qualities may be destroyed causing the permafrost to thaw and the surface to subside. To prevent melting the permafrost, every road, building, pipeline, and platform rests on either thick insulating gravel pads or insulated pilings. Because of the permafrost problem, for example, TAPS runs above ground for slightly more than half its 800 mile length resting on 78,000 insulated supports.

Pack ice presents a special problem for offshore producers in arctic regions of the United States. Because conventional drilling platforms cannot withstand the pressure of pack ice, an entirely new technology has been developed to drill for and produce oil offshore in the arctic. Sohio is constructing a gravel island in 48 feet of Harrison Bay water off the north coast of Alaska which will stand 25 feet above sea level and 350 feet across. When completed at a cost of \$70 million, Mukluk Island will be the site of exploratory drilling on a Beaufort Sea lease for which Sohio paid \$227 million. There is, of course, no assurance that the exploratory drilling for which these sums have been expended will be successful.

*4. Regulatory Constraints.*

Exploration in the American Arctic is constrained by regulatory restrictions on the drilling season designed to protect plant and animal life. Onshore exploratory drilling is generally limited to approximately nine winter months when the tundra is frozen and has sufficient snow cover that supply vehicles and drilling rigs can be transported across ice roads without damage to the fragile tundra plant life. Offshore drilling is precluded during the months of late summer and early autumn when the Bowhead Whales, an endangered species, migrate through the Beaufort Sea. These seasonal restrictions, which apply only to drilling in the American Arctic, cause the periodic idling of huge capital investments and thereby substantially increase the cost of exploring for and producing arctic oil.

*5. Capital Requirements.*

The remoteness, adverse climate, and environmental constraints contribute to costs of exploration and development in the arctic that are dramatically higher than elsewhere in the United States. Costs per well in the arctic average more than ten times the cost of lower-48 wells.

A major reason underlying such enormous capital obligations is that, owing to its frontier character, the American Arctic has no infrastructure to support oil exploration and production activities. Thus, every supply and facility must be transported thousands of miles to the site. The development of the Prudhoe Bay field required construction of an arctic city complete with housing, medical and recreational facilities, water supply systems, sewage treatment plants, power plants, roads, docks, an air strip, and communications systems. With respect to other domestic production, of course, at least some—and usually all—such basic facilities are already available within reasonable distances and at substantially lower cost. In the arctic, how-

ever, producers must function essentially on a bring-your-own basis. Such was the case at Prudhoe Bay, and similar demands will be made of producers developing other fields in the American Arctic.

Because of these exceptionally high costs of arctic exploration and production, the risks and consequences of failure are multiplied; "success" carries a much narrower definition. Discoveries that would be hailed in the rest of the United States may simply be uneconomic in the arctic, where the estimated reserves of a moderate size field may not justify the high capital costs involved in bringing the oil to market. Thus, "success" in arctic proportions requires a much larger discovery than is required in more hospitable environs. Not surprisingly, as the economic threshold increases, there is a corresponding rise in the risk of an uneconomic discovery.

### B. Congress Was Aware of the Potential and the Unique Burdens of Exploration and Development in the American Arctic.

Congress was fully informed of the obligations burdening arctic petroleum production. In addition, Congress was told that the United States Geological Service had estimated that nearly one-third of the undiscovered petroleum reserves in the United States lie in Alaska and the adjoining continental shelf, most of it north of the Arctic Circle. *Senate Hearings*, 235 (statement of Alton W. Whitehouse), 256 (statement of W. F. Kieschnick). Thus, it was made clear that the American Arctic was distinctive not only for the burdens it imposed on oil producers but also for its great, but unrealized, potential to contribute to the solution of the country's energy shortage.

The economic burden of arctic production was graphically illustrated to Congress by the Prudhoe Bay experience. After years of fruitless exploration—and countless

dry holes—on the North Slope, the effort was finally rewarded with the discovery of the large Prudhoe Bay oil field. Even then, however, the participants were required to spend nearly $4 billion to bring the field into production and over $9 billion to construct a pipeline to transport the oil. Moreover, Congress was informed that the participants will spend between $12 billion and $15 billion more just to maintain the field's production. *Id.* at 233, 254, 258.

There was thus ample basis for the statement during the Senate debate that

> "It is generally agreed that there is a greater degree of risk in exploration and development in frontier areas, such as the Alaska North Slope, than there is in the traditional Lower 48 oil exploration. Major factors contributing to these increased risks are severe weather conditions, remoteness, sensitive environmental and geological characteristics, and a lack of normal social and industrial infrastructure."

125 Cong. Rec. S16,327 (daily ed. Nov. 8, 1979). In classifying oil production for purposes of the windfall profit tax principally on the basis of the perceived ability of production to respond to enhanced producer revenues, it was both proper and necessary for Congress to base that determination, at least in substantial part, on the economic burdens that already served to inhibit production of discovered reserves. This was especially appropriate with respect to the arctic, which, as previously noted, Congress had been advised contained an estimated one-third of the potential undiscovered reserves in the country. The economic burdens depressing production levels would inevitably be counteracted by the increased revenues from decontrol. Formations that would otherwise be uneconomic would become producible. In short, the windfall profit tax would function as intended, in harmony with national energy policy.

### C. The "Alaska Exemption" is Based Not on Locational Considerations, But on Differences That are Central to the Objectives of the Windfall Profit Tax.

Having declared its intent to classify oil, and to vary the tax burden among the classes, according to the anticipated ability of the production of each category to respond positively to enhanced decontrol revenues, Congress exempted certain types of arctic oil consistently with that legislative objective. In short, this oil and certain other categories of exempt oil were distinguished from non-exempt oil for the same reason that tier one oil was perceived to be different from other tiers of oil — the anticipated response to decontrol.[9] Since the "exempt

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[9] See authorities cited at note 8. The point was made during the Senate debate in the following terms:

> "The test for exemptions found in the bill to date is a very simple test and it has to do with production effects of the exemptions. That is to say, that over and over again it was argued in the Finance Committee and on the floor of the Senate that this exemption or that exemption is justified because it relates to national energy policy, that, if the Federal Government foregoes revenues by the exemption route on certain types of oil, those exemptions will be justified by production effect on types of oil that are thought to be sensitive to the taxation on its production."

125 Cong. Rec. S18,651 (daily ed. Dec. 15, 1979). It was also stated that, in the absence of an exemption for arctic oil, "as much as 3 billion barrels of reserves may remain in the ground because at the lower price they will be uneconomic." 125 Cong. Rec. S16,327 (daily ed. Nov. 8, 1979). The Alaska exemption was also described by the Joint Committee on Taxation as "intended, in part, to eliminate the possibility of creating a disincentive for the production of Alaskan oil." Joint Committee on Taxation, "The Design of a Windfall Profit Tax," 96th Cong., 1st Sess. 21 (1979). See also 125 Cong. Rec. S16,845-46, S16,864 (daily ed. Nov. 16, 1979), S17,268-85 (daily ed. Nov. 27, 1979), and S17,496 (daily ed. Nov. 29, 1979), 126 Cong. Rec. H1841 (daily ed. Mar. 13, 1980) and S2629 (daily ed. Mar. 19, 1980), for further discussion of the policy considerations underlying the various exemptions and the structuring of the various tiers.

Alaskan oil" classification is based on the same standard that underlies the other classifications established in the windfall profit tax, the challenged classification is obviously neither an overt nor a disguised locational discrimination.

Presumably, such a basis for classification does not in itself give rise to a constitutional infirmity, and the appellees do not appear to contend otherwise. Congress simply chose to ration the economic benefits of decontrol according to its perception of how much additional domestic oil production the public will derive in return for the higher price it pays. But for the fact that Congress found this geographically neutral standard to be satisfied by production within a particular geographic region of the country, one would expect that there would be no basis for invalidating the legislative classification. The critical questions, therefore, are 1) whether the uniformity clause precludes *per se* any finding that the standard applied by Congress was satisfied by all production in a given region, and 2) if Congress is free to make such a finding, whether it has sufficient basis in fact to satisfy uniformity clause requirements.

This Court has already rejected the proposition that the uniformity clause precludes Congress in all cases from determining that a set of legislatively dispositive conditions persists in a given region and not in others. *Head Money Cases, supra; Regional Rail Reorganization Act Cases, supra; Nicol v. Ames*, 173 U.S. 509 (1899). In the *Head Money Cases*, one of the seminal decisions on the meaning of the uniformity clause, the Court showed no hesitation in approving an excise tax over a uniformity clause challenge, even though the tax by its essential terms was applicable only to the coastal states and not to the inland states:

> "[T]he evil to be remedied by this legislation has no existence on our inland borders, and immigration in that quarter needed no such regulation. Perfect uniformity and perfect equality of taxation, in all the

aspects in which the human mind can view it, is a baseless dream, as this court has said more than once. Here there is substantial uniformity within the meaning and purpose of the Constitution."

112 U.S. at 595 (citations omitted). The Court displayed the same practical approach in the earlier case of *Nicol v. Ames:*

"The question always is, when a classification is made, whether there is any reasonable ground for it, or whether it is only and simply arbitrary, based upon no real distinction and entirely unnatural. If the classification be proper and legal, then there is the requisite uniformity in that respect."

173 U.S. at 521 (citations omitted). By the same token, the Court explicitly acknowledged in the *Regional Rail Reorganization Act Cases* the propriety of Congress' recognizing "differences that exist between different parts of the country" and "geographically isolated problems." 419 U.S. at 159. Thus, there is no room for any assertion that the uniformity clause absolutely precludes Congress from focusing excise tax legislation in geographic terms.[10]

Since the Court has held that the uniformity clause permits Congress to consider geographic differences, the issue remains whether the "differences" asserted in support of the geographically described classification have sufficient

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[10]Contrary to the assertions by the appellees, this Court's decision in *Railway Labor Executives Association v. Gibbons*, 455 U.S. 457 (1982), did not reduce the practical flexibility that the Court has traditionally accorded to the uniformity clause. That case addressed a statute enacted for the benefit of a single bankrupt railroad. In expressly reaffirming its holding in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), the Court distinguished the statute before it on the ground that it was "not a response . . . to any geographically isolated problem: it is a response to the problems caused by the bankruptcy of *one* railroad." 455 U.S. at 470 (emphasis in original).

basis in fact. In this instance the foundation for the congressional determination is so firmly established both in the legislative record and as a matter of acknowledged fact that, whatever standard of review the Court applies, there is ample justification for the classification and it should be sustained. The appellees are essentially left to quibble that the classification should have been somewhat broader here or there to encompass perhaps other areas where the economic conditions show some similarities to the American Arctic.[11] Such vague similarities, however, provide scant basis for attacking a legislative classification. It cannot be said that any other domestic areas with significant potential oil reserves were shown, or could have been shown, to Congress to involve the unique combination of burdens that, in the aggregate, even approach those encountered in the areas encompassed by the Alaska exemption.

As a matter of policy, it might be argued that certain production outside this exempt category could also respond affirmatively to enhanced decontrol revenues even though the inherent burdens faced do not rise to the level of those experienced in the American Arctic. However, these are matters of degree most appropriately left to the legislature.

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[11]For example, it has been noted that Congress could have expressed the classification in terms that would have encompassed roughly the same geographic region but perhaps included limited other areas of the United States. Motion of Taxpayer and Association Appellees to Affirm at 10. While Sohio agrees that Congress was free to adopt such an approach in its effort to prevent the windfall profit tax from becoming a disincentive to increased production, the essential issue is whether Congress was *required* to take such a tack in preference to the course it selected. Consistently with the legislative prerogative to "take one step at a time," it is inappropriate to fault Congress for addressing a specific set of circumstances that were shown to exist, solely because it did not also deal with hypothetical circumstances that might or might not exist elsewhere. *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955).

Congress devoted months of study to the question of production response to the windfall profit tax; and, since the courts are not as well equipped as the legislature to undertake this sort of factual analysis, they have traditionally and appropriately been reluctant to substitute their judgment on such matters for that of Congress. The Court has long acknowledged that the legislature "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. [It] may select one phase of one field and apply a remedy there, neglecting the others." *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955) (citations omitted).

This analysis is not altered by Congress' use of geographic terms to describe the exemption. The uniformity clause is not an iron rule of draftsmanship that prevents Congress from articulating its intentions in geographic terminology if this is the most convenient means to express a classification that is rooted in proper policy considerations. As Judge Friendly has said in this connection:

> "Since what Congress did was not in violation of the Constitution, we decline to hold its action to have constituted a breach of the uniformity clause simply because it used words readily intelligible to its members and the public rather than circumlocutions that would have had exactly the same effect."

*In re Penn Central Transportation Company*, 384 F. Supp. 895, 916 (Regional Rail Reorg. Ct. 1974). The uniformity clause does not require Congress to engage in verbal gymnastics to attain an otherwise legitimate legislative objective.

As Congress realized, there is tension between the dual objectives of the windfall profit tax—the taxation of decontrol revenues and the stimulation of domestic oil production. The congressional distinction among the three tiers of oil and between exempt and non-exempt oil

represents its determination of the most effective means of maximizing both objectives. Since the classification at issue was based on differences that are central to these legislative objectives and not on any desire to convey a benefit to any region or location, the classification is within the flexibility that the Court has acknowledged in the uniformity clause. While the particular problem addressed may have a geographic concentration, the classification is geographic only in terms of nomenclature; in other respects it is no more geographic than that which this Court sustained in the *Head Money Cases* and in the *Regional Rail Reorganization Act Cases*. The uniformity clause does not require that Congress choose between taxing decontrol revenues and encouraging optimal domestic petroleum production. It may, as it has done here, address both objectives in a forthright manner without running afoul of the uniformity clause.

### III. The Alaska Exemption Can Be Sustained Without Diluting the Uniformity Clause.

Sustaining the Alaska exemption need not convert the uniformity clause into an equal protection clause for taxpayers. As a general matter, the Court has held that equal protection permits all but the most arbitrary classifications in taxation matters. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973); *Kahn v. Shevin*, 416 U.S. 351 (1974). The uniformity clause, however, is much more specialized in scope and substantially restricts congressional discretion when it comes to excise tax classifications based on location. Indeed, the Court might well conclude that the uniformity clause prohibits such classifications altogether. Nevertheless, a critical first step in the analysis of any classification under the uniformity clause is to determine whether the classification is in fact location-based. As the Court's decision in the *Regional Rail Reorganization Act Cases, supra*, indicates, this determination cannot be made

solely from the formal language of the statute. The courts must look behind geographic terminology to determine whether the classification is based on differences other than location.

It is not enough to begin and end the analysis, as the District Court did, with the proposition that the uniformity clause requires that "the tax . . . operates with the same force and effect in every place where the subject of it is found"; it remains necessary to define the subject of the tax in order to apply this proposition. The Court must determine whether Congress legitimately found geographically isolated problems or conditions from which it could conclude that the subject taxed was different from subjects not taxed. In making this determination the Court may find it appropriate to apply special scrutiny to excise tax classifications that are cast in geographic terms in order to guard against wholesale incursions on the interests protected by the uniformity clause.

If the Court were to decide that the appropriate standard of review is a rational basis test, then it could perhaps be said that this step of the uniformity clause analysis would be no more restrictive than the minimal equal protection scrutiny accorded tax classifications. However, that is not inevitable. The Court has demonstrated, for example, that, even under a rational basis analysis, there are some interests that may justify the Court's special attention and thus a more critical review. See, e.g., *Reed v. Reed*, 404 U.S. 71 (1971); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975). Moreover, the Court could also determine that this issue requires it to balance the traditionally broad power of classification accorded the legislature in taxation matters against the important interests safeguarded by the uniformity clause to arrive at a somewhat more rigorous standard of review requiring the courts to determine whether the classification has a "fair and substantial" relationship to nonlocational objectives of the taxing legislation. See, e.g.,

*State v. Erickson*, 574 P.2d 1, 11-12 (Alaska S. Ct. 1978). This would require the courts first to assess whether the legislation indeed had a nonlocational objective and second to judge whether the challenged classification bore a fair and substantial relationship to that objective. Such a standard of review would give full measure to the interests protected by the uniformity clause while at the same time retaining the flexibility that the Court has previously said must inhere in that provision to allow Congress to deal with regional problems.

Whichever standard of review is applied in this case, the unique burdens that Congress found to encumber production in the American Arctic would appear to afford an ample basis from which it could properly conclude that such production constituted a subject of taxation separate and distinct from production not so burdened. For that reason, the Court can sustain the Alaska exemption without concern that it is thereby granting *carte blanche* for all manner of locational discriminations in excise taxes.

## CONCLUSION

The judgment of the United States District Court for the District of Wyoming should be reversed on the ground that the exemption prescribed in 26 U.S.C. §§4991(b) and 4994(e) is not inconsistent with the uniformity clause of Article I, Section 8, clause 1 of the Constitution.

Respectfully submitted,

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March 1983

No. 82-1066-ADX
Status: GRANTED

Title: United States, Appellant
v.
Harry Ptasynski, et al.

Docketed:
December 22, 1982

Court: United States District Court
for the District of Wyoming

Counsel for appellant: Solicitor General

Counsel for appellee: Lafitte,Gene W., Boudin,Michael,
Richards,David R., Scoggins Jr.,Harold B.

| Entry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 1 | Dec 22 1982 | G | Statement as to jurisdiction filed. |
| 2 | Jan 6 1983 | D | Motion of the Solicitor General to expedite consideration of the statement as to jurisdiction filed. |
| 3 | Jan 7 1983 | | Response of appellees to motion of the Solicitor General to expedite consideration filed. |
| 4 | Jan 10 1983 | | DISTRIBUTED. Jan. 14, 1983. (Motion of Solicitor General to expedite consideration). |
| 5 | Jan 14 1983 | X | Motion of appellee State of Texas to affirm filed. |
| 6 | Jan 14 1983 | X | Motion of appellee Indep. Petroleum Assoc., et al to affirm filed. |
| 7 | Jan 14 1983 | X | Motion of appellee State of Louisiana to affirm filed. |
| 8 | Jan 17 1983 | | Motion of the Solicitor General to expedite consideration of the DENIED. Justice Blackmun and Justice O'Connor would grant this motion. |
| 9 | Jan 19 1983 | | DISTRIBUTED. February 18, 1983 |
| 10 | Feb 22 1983 | | PROBABLE JURISDICTION NOTED. |
| | | | ****************************************************** |
| 11 | Feb 28 1983 | | Brief of appellant United States filed. |
| 12 | Mar 1 1983 | | Joint appendix filed. |
| 13 | Mar 3 1983 | | Brief amicus curiae of Atlantic Richfield Company filed. |
| 14 | Mar 7 1983 | | Record filed. |
| 15 | Mar 7 1983 | | Certified original record on appeal, 4 volumes, received |
| 16 | Mar 10 1983 | G | Motion of the Solicitor General to direct the Clerk to schedule oral argument during April, 1983 filed. |
| 17 | Mar 11 1983 | | DISTRIBUTED. March 18, 1983. (Above motion) |
| 18 | Mar 14 1983 | | Appellees response to motion of Solicitor General to set case for oral argument during the present term filed. |
| 19 | Mar 21 1983 | | Motion of the Solicitor General to direct the Clerk to schedule oral argument during April, 1983 GRANTED. |
| 20 | Mar 23 1983 | D | Motion of Texas for divided argument and for additional time for oral argument filed. |
| 21 | Mar 24 1983 | | SET FOR ARGUMENT. Wednesday, April 27, 1983. (3rd case) 1 hour |
| 22 | Mar 28 1983 | | Brief amicus curiae of The Standard Oil Company filed. |
| 23 | Mar 29 1983 | | Brief amicus curiae of Legal Foundation of America filed. |
| 24 | Mar 29 1983 | | Brief amicus curiae of State of Alaska filed. |
| 25 | Apr 4 1983 | | Motion of Texas for divided argument and for additional time for oral argument DENIED. |
| 26 | Apr 1 1983 | | CIRCULATED. |

No. 82-1066-ADX

| Entry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 27 | Apr 6 1983 | X | Brief amicus curiae of Farm Bureau Federation, et al. filed. |
| 28 | Apr 7 1983 | X | Brief amicus curiae of Sen Don Nickles, et al. filed. |
| 29 | Apr 8 1983 | X | Brief of appellee State of Texas filed. |
| 30 | Apr 8 1983 | X | Brief of appellees Indep. Petroleum Assoc., et al filed. |
| 31 | Apr 8 1983 | X | Brief of appellee State of Louisiana filed. |
| 32 | Apr 8 1983 | X | Brief of appellees Ptasynski, et al. filed. |
| 33 | Apr 11 1983 | X | Brief amicus curiae of Gulf & Great Plains Legal Foundation of America, et al. filed. |
| 34 | Apr 9 1983 | X | Brief amicus curiae of US Representative Silvio Conte filed. |
| 35 | Apr 20 1983 | X | Reply brief of appellant United States filed. |
| 36 | Apr 27 1983 | | ARGUED. |